SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
JAN 26 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1057

RICHARD A. BELANGER,
PETITIONER,
v.
ARTHUR B. MATTESON and
WARWICK TEACHERS UNION,
LOCAL 915, AFT, AFL-CIO,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Blanchard Press, Inc., Boston, Mass. — Law Printers

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

Richard A. Belanger, your petitioner, prays that a Writ of Certiorari issue to review the Judgment of the Supreme Court of Rhode Island entered in the above-entitled case on October 29, 1975.

Opinions Below

The opinion of the American Arbitration Association, Arbitration Panel, in the Matter of Arbitration between Warwick Teachers Union, Local 915, AFT, AFL-CIO and the Warwick School Committee, case number 1139-0036-73, is set forth in Appendix, pp. A-69 to A-85.

The opinion of Mr. Justice Mullen, retired Presiding Justice of the Superior Court for the State of Rhode Island in the case of *Richard A. Belanger* v. *Arthur B. Matteson et al.* is set forth in Appendix, pp. A-48 to A-62.

The opinion of the Court below, the Supreme Court of Rhode Island is recorded at R.I. , 346 A.2d 124 (1975), and is set forth in Appendix, pp. A-1 to A-36.

Jurisdiction

The decision of the Supreme Court of Rhode Island was rendered on October 29, 1975. A timely petition for reargument was denied by order of the Rhode Island Supreme Court, on November 13, 1975 (Appendix, p. A-37).

Pursuant to the decision of the Rhode Island Supreme Court, the case was remanded to the Superior Court for the State of Rhode Island and an order dated December 3, 1975 was entered vacating the earlier judgment of the Superior Court (Appendix, p. A-83-84).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Question Presented

Richard A. Belanger, ("Belanger"), a teacher in the school system for the City of Warwick, Rhode Island, was promoted by the Warwick School Committee, ("School

Committee"), to the position of Business Department Head at Warwick Veterans Memorial High School. Arthur B. Matteson, ("Matteson"), also a teacher in the Warwick School System, was a disappointed applicant for the position. Matteson informed the Warwick Teachers Union, ("Union"), that he wanted to grieve the decision of the School Committee appointing Belanger to the position. The Union represented Matteson at each and every step of the grievance procedure, and the matter ultimately went to arbitration. Belanger, whose job was sought by Matteson, was not a party to the arbitration hearing nor was he represented by counsel or otherwise. The arbitrators reversed the decision of the School Committee appointing Belanger and determined that Matteson was entitled to the position.

Belanger then brought suit in the Superior Court of the State of Rhode Island, seeking to vacate the arbitrators' decision. The Trial Justice found that the Union breached its duty of fair representation to Belanger and vacated the arbitration award. Matteson and the Union appealed to the Rhode Island Supreme Court.

The opinion of the Rhode Island Supreme Court recognized that as a matter of Rhode Island law, a school teachers' union, which is the exclusive bargaining agent for all teachers, has a statutory duty to fairly and adequately represent the interests of each and every teacher. (Appendix, pp. A-5 to A-6). The Court further found that the duty to fairly represent all teachers applied in handling employee grievances as well as in contract negotiations. (Appendix, pp. A-8 to A-9). The Rhode Island Supreme Court, in this case, emphatically affirmed the decision of the Trial Justice which found as fact the Union breached its duty to fairly represent Belanger in the arbitration hearing. (Appendix, p. 9). Nevertheless, the Rhode

Island Supreme Court overturned the decision of the Trial Justice and reinstated the arbitrators' award.

The question, therefore, presented in this case is whether it is a denial of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution to remove a school teacher from his job without giving him an adequate hearing at which he is properly and adequately represented.

Constitutional Provision Involved

Involved in this case is the Fourteenth Amendment to the Constitution which guarantees that no person shall be deprived of property without due process of law.

Statement

On June 22, 1972, pursuant to the collective bargaining agreement between the School Committee and the Union, a notice of a vacancy in a promotional position, namely, Business Department Head at Warwick Veterans Memorial High School, was posted. Four candidates applied for this vacancy including petitioner, Belanger, and respondent, Matteson. As is the practice for such promotional positions, the Superintendent appointed an evaluating committee to review the applications, interview the candidates and make recommendations to the Superintendent. Plaintiff was the unanimous choice of the committee and the Superintendent, after reviewing the candidates with the evaluating committee, concurred in their judgment. The School Committee, after independently reviewing the applications, selected Belanger for the vacancy on August 1, 1972.

The agreement between the Union and the School Committee provides with respect to promotions:

> "Candidates shall be recommended on the basis of qualifications for the position. Where qualifications are considered equal, seniority in the Warwick School System shall prevail."

The School Committee determined that Belanger had superior qualifications to the other applicants because Belanger was not the applicant with the most seniority.

When Matteson was notified that he was unsuccessful in obtaining the promotion to Business Department Head, he wrote to the Union indicating that he would like to grieve the decision of the School Committee. The Union, on Matteson's behalf, wrote to John S. Venditto, the Assistant Superintendent of Schools for Personnel and commenced the grievance procedure pursuant to the collective bargaining contract.

The Union, through its representatives, handled Matteson's grievance through the various steps of the grievance procedure as provided in the collective bargaining agreement. At each step of the way, the Union presented Matteson's case with the design to remove Belanger from the position. The testimony at trial was undisputed, the Trial Justice found as fact, and the Supreme Court affirmed his findings, that throughout the grievance procedure, the Union never contacted Belanger or considered his qualifications for the position. The Union aligned itself totally with Matteson. (See Appendix, p. A-9). The initial steps of the grievance procedure were at an administrative level and the final step was binding arbitration. The Union could not take its grievance to binding arbitration without a vote by its executive committee. Mr. McElroy, Executive Director of the Union, testified that at the meeting of the executive committee he explained Matteson's grievance and explained that he thought the case should go to arbitration. Mr. McElroy and Mr. Tammelleo,

President of the Union, both testified that they never notified Belanger about Matteson's grievance, and that they never informed him of the outcome of each step of the proceedings. They further testified that they never considered Belanger's qualifications for the job at any point, especially at the time the executive committee voted to take the matter to arbitration.

The arbitration hearing was set down for April 6, 1973. Mr. Venditto was to present the case for the School Committee at the arbitration. Therefore, approximately two weeks before the arbitration, Belanger was notified that he was to be a witness at the arbitration, and he met with Mr. Venditto to discuss his testimony. Belanger testified at trial that prior to the arbitration hearing, he asked Mr. Venditto if he could bring an attorney to represent him at the hearing. According to Belanger, Mr. Venditto replied that he did not need an attorney and should not bring an attorney because the matter was between the School Committee and the Union. Mr. Venditto testified that he did not recall this conversation but he did not rule out the possibility that Mr. Belanger may have made such a request.

Mr. McElroy presented the Union's case at the arbitration. He met with Matteson to go over his testimony, and he met with other witnesses who were to testify on Matteson's behalf. Mr. McElroy never contacted Belanger prior to the arbitration to determine what his qualifications for the position of Business Department Head were.

On April 6, 1973, the arbitration hearing was held at the Howard Johnsons Motor Lodge in Warwick, Rhode Island. The hearing lasted from 10:00 a.m. to approximately 6:30 p.m. A number of witnesses were presented by the Union and by the School Committee. Matteson was called by the Union and Belanger was called by the School Committee. Mr. Venditto had the opportunity to cross-examine the Union's witnesses and Mr. McElroy had

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the opportunity to cross-examine the School Committee's witnesses, including Belanger.

Subsequent to the hearing, Mr. McElroy and Mr. Venditto filed briefs on behalf of their respective positions. The arbitrators' decision was rendered on August 17, 1973). Appendix, pp. A-69 to A-83). Even though the contract provided that the arbitrators' decision shall be rendered within twenty (20) days after the hearing, the decision in this case was not rendered until more than four (4) months after the hearing. Once again, Belanger was never consulted about this extension of the time limits of the contract.

Both at the arbitration hearing and at trial, Belanger and Matteson testified as to their qualifications. The following is a brief comparison of the relative academic qualifications of both individuals:

Mr. Belanger	Mr. Matteson
BS in Accounting (1949)	BA
BA in Business Ed (1960)	MA in Education
MA in Secondary Administration and Guidance (1964)	More seniority
MBA in Business Administration (1969)	
Unanimous recommendation of evaluating committee who considered his personal qualifications superior	Pursuant to the collective bargaining agreement, he receives $950.00 for his Masters Degree in Education plus 30 semester hours in Education or administration
Recommendation of Superintendent	
Appointment by School Committee	
Pursuant to the collective bargaining agreement, he receives $1,300.00 for his in-subject matter Masters Degree and his 30 semester hours of graduate course work in Administration pursuant to the agreement between the School Committee and the Union.	

After the arbitrators' decision, Belanger was removed from the job which he had held for nearly one year and Matteson took his place. Belanger then informed the Union that he felt that he had a grievance. The Union replied that they would pursue any grievance that he might have regarding the adequacy of his representation by the School Committee but that they would not pursue any grievance which would attempt to get Belanger's job back. Belanger sought legal advice which resulted in the instant action. Belanger through his counsel had obtained the agreement of the School Committee to join in his court effort to seek his job back. Therefore, a petition to vacate the arbitration award was filed, which petition was signed by the Warwick City Solicitor. Mr. McSally, Chairman of the School Committee, testified that the day after the petition was filed he met in his office with representatives of the Union. He further testified that he instructed Belanger's counsel to make him a party defendant rather than a party plaintiff. He testified as follows:

> "So I then called you (Frank Licht) on the telephone, we had a discussion. I told you that I had been getting some heat from the Union. I can't recall whether I told you whether they were in the office at that time. But that you know, we don't need battles, that we don't have to fight, we have enough that we have to fight."

The case was tried in the Superior Court for the State of Rhode Island, County of Kent, before a justice sitting without a jury on November 15, 16, 19 and 20, 1973. The Court rendered its written decision on February 26, 1974. (See Appendix, pp. A-52 to A-62). On March 20, 1974, the Court entered judgment which contained its findings of fact and conclusions of law. (See Appendix, pp. A-48 to A-51).

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In respect to the conduct of the Union, the Court found, *inter alia*, the following facts: the Union pursued Matteson's grievance without ever contacting Belanger or considering his qualifications for the position; the Union and the School Committee waived established time limits without Mr. Belanger's assent; *the conduct of the Union was arbitrary and discriminatory towards Belanger,* because their sole regard was for Matteson and the Union labored affirmatively against the rights of Belanger, who was also a member of the Union (see paragraph 5 through 10 of the Judgment, Appendix, p. A-49).

On the basis of the facts found, the Court made the following conclusions of law:

> "1. The defendant Union breached its duty to fairly represent the plaintiff.
> 2. The plaintiff was denied his right to fair representation at the arbitration hearing.
> 3. The Board of Arbitration exceeded its power in causing the dismissal of the plaintiff from the post of Business Department Head of Warwick Veterans Memorial High School and the appointment of defendant Matteson in his place and stead.
> 4. The Board of Arbitration acted in violation of law because the plaintiff was denied his right of fair representation at the arbitration hearing." (See Appendix, pp. A-50 to A-51).

The Court, therefore, vacated the arbitrators' award and ordered the School Committee to restore Belanger to the position as Business Department Head at Warwick Veterans Memorial High School.

Matteson and the Union appealed the decision to the Rhode Island Supreme Court and in a decision dated

October 29, 1975, the Supreme Court of Rhode Island in a 4-1 decision, reversed the decision of the Trial Justice and remanded the case in order to reinstate the arbitrators' award.

Reason for Granting the Writ

The opinion of the Rhode Island Supreme Court, by its very terms, states emphatically that Belanger suffered a wrong. The opinion, however, removed any remedy which the petitioner might have. It is the very essence of due process that where there is a wrong, the Court will fashion an appropriate remedy.

The Supreme Court of Rhode Island said with respect to the Union's activity:

> ". . . We are faced with a clear breach by the Union of the duty that is owed to Belanger." (See Appendix, p. A-9).

The Court went on to say:

> "In the present case, the Union never offered Belanger an opportunity to present his case to them. It never recognized its duty to independently determine whether Matteson or Belanger was entitled to the job. . . . For a union to make a decision affecting its members without investigating the underlying factual situation is a clear breach of the duty of fair representation." (See Appendix, pp. A-10 to A-11).

The Court further said:

> ". . . the Union's decision to press on with Matteson's grievance without making any effort to assess the rela-

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> tive qualifications of the respective candidates was patently defective thus, the Union breached its duty to represent fairly the interest of one of its members —Belanger." (Appendix, p. A-12).

After recognizing this flagrant and patent violation of the Union's duty to fairly represent Belanger, the Court overturned and reversed the decision of the Trial Justice.

> ". . . we cannot agree with the remedy he fashioned." (Appendix, p. A-12).

The effect of the Court's decision, therefore, is to say that although Belanger suffered a wrong, he shall have no remedy.

The only reference by a Court to a potential remedy for Belanger is as follows:

> "He (Belanger) has a right to use the judicial process to remedy that wrong, but the remedy must be co-extensive of the damage occasioned by the breach and that damage does not necessarily encompass the loss of his job. The Union could have, consistent with its duties, still found Matteson to be the proper choice for Business Department Head at Warwick Veterans Memorial High School . . . . , thus, the Union's wrong here was not the direct cause of the adverse arbitration decision." (Appendix, pp. A-13 to A-14).

In essence, the Court has said to Belanger, "We recognize that you are wronged, but your damages are speculative, so we cannot help you." This decision is inconsistent with any notion of fair and equal justice. It notifies the Union that while it has a duty to fairly represent all members of the bargaining unit, it is free from any liability

if it violates that duty. If the decision of the Court is allowed to stand, the Unions have been given carte blanche to treat their members in any discriminatory fashion because although they have a duty, their failure to comply with the duty is immune from the legal process.

The issue presented by this case was squarely faced by the Wisconsin Supreme Court. In *Clark* v. *Hein-Werner Corp.*, 8 Wis. 2d 264, 99 N.W. 2d 132 (1959), *reh. den.* 100 N.W. 2d 317 (1960), certain members of a union had been promoted out of the bargaining unit to supervisory positions. The employer demoted these individuals and transferred them back to the bargaining unit which resulted in certain lay-offs of other employees. Those employees laid off grieved the decision and the union, representing those laid-off, took the grievance to arbitration. The issue in arbitration was whether the former supervisory employees could count their time in their supervisory capacity in computing seniority. The arbitrator said they could not, and restored those laid-off to their former positions. The former supervisory personnel sued to enjoin the enforcement of the arbitrators' award. The Trial Court held that the employees had a property interest in their seniority rights and since the former supervisory personnel were not given notice of the arbitration hearing and were not given the opportunity to participate in that hearing, their property rights had been taken away from them without due process of law. Consequently, the Trial Court enjoined the enforcement of the award. The Union appealed, but the Wisconsin Supreme Court affirmed. The Court said:

> "... where the interest of two groups of employees are diametrically opposed to each other and the union espouses the cause of one in the arbitration, it follows as a matter of law that there has been no fair representation of the other group. This is true even though,

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> in choosing the cause of which group to espouse, the union acts completely objectively and with the best of motives. The old adage, that one cannot serve two masters, is particularly applicable to such a situation." 99 N.W. 2d at 137.

The Court also found that employees should not have to rely on their employer to espouse their cause in arbitration. It said:

> "Employees not fairly represented by the Union should not be put in the position of having to solely depend upon the employer championing their rights under the collective bargaining agreement." 199 N.W. 2d at 138.

The Trial Justice, in the instant case, rejected any contention that the School Committee adequately represented Belanger's interest in the arbitration hearing. (See Para. 11 of the Findings of Fact, Appendix, pp. A-49 to A-50).

The respondents in their brief in the Rhode Island Supreme Court have cited a number of cases which attempted to distinguish the *Clark* case. The case, however, has been cited with approval in numerous cases including *Acuff* v. *United Paper Makers*, 404 F.2d 169, 171 (1968); *DeMarco* v. *Thatcher Furnace Co.*, 102 N.J. Super. 258, 245 A. 2d 773, 780 (1968); *Donnelly* v. *United Fruit Co.*, 40 N.J. 61, 190 A. 2d 825, 835 (1963).

The cases relied upon by the respondents are distinguishable from the instant case. The petitioner does not dispute that there are certain issues where a union must represent the interests of the entire bargaining unit. For example, where there is a necessity to interpret the meaning of a provision in the collective bargaining contract, the union is the proper party to represent the bargaining unit even

perhaps where that interpretation would benefit some members of the union rather than others, i.e., the seniority cases relied upon by the respondents. Similarly when there is a matter that affects all members of the bargaining unit equally the union is the proper party to go to arbitration.

However, in the instant case, the issue did not affect all members of the bargaining unit and the issue did not call for an *interpretation* of the collective bargaining agreement. Rather, the issue called for *application* of the contract. In the instant case, the conflict was not between the union and the employer but rather it was a conflict between two employees. At issue were the conflicting rights of two members of the bargaining unit to a particular position in the school system. Petitioner contends that where two employees, both members of the bargaining unit have interests which are in conflict, a union cannot side with one employee without breaching its duty of fair representation to the other. Both the Superior Court and the Supreme Court of Rhode Island concurred in this position.

The problem, therefore, is that since Belanger was denied his rights to fair representation, how was he to adequately protect his property interests in his job at the arbitration hearing. Matteson had the advantage to consult representatives of the Union who were well versed in the grievance procedure at each and every step of the way. He was afforded all assistance in making sure that his assertions were properly made. The weight of the Union was always behind him. The Union selected one arbitrator and had a voice in selecting the third. Mr. McElroy, the Union Executive Director, prepared Matteson's case and represented him at the arbitration hearing and wrote a brief in his behalf. Mr. McElroy, experienced in conducting arbitration cases, cross-examined each and every witness presented by the School Committee, including the cross-examination of

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Belanger. In short, Matteson had excellent representation in his effort to win Belanger's job.

On the other hand, Belanger had no representation. He was never informed of the different steps that Matteson was taking. He was only allowed to appear as a witness in the arbitration proceeding. He was not made a party to that proceeding, yet his rights were as much, if not more, at stake than those of Matteson.

Plaintiff was simply a witness at the arbitration hearing. A witness can only answer the questions propounded to him, and being a witness, cannot be a substitute for being allowed to present the case to support one's contentions. Plaintiff, by not being a party to the arbitration proceeding, had no way to protect his interest. He had no voice in the selection of the crucial impartial arbitrator; he had no right to present witnesses; he had no right to cross-examine witnesses; he had no right to argue the law and the facts to the arbitrators; and he had no right to file memoranda in support of his position. In short, he was denied every fundamental right which due process of law was intended to guarantee. He was denied the right to protect his interest in his property rights.

While the School Committee sought in the arbitration hearing to sustain its position, it cannot be viewed as the protector of Belanger's rights and interests. In the first instance Belanger wanted to have legal counsel represent him at the hearing. He was told by the School Committee that this was not permissible. How can the School Committee which denied him the right to legal counsel be viewed as the protector of his interest. The very posture of the case in the Superior Court indicates that an employer can be a short-lived ally and no employee should be forced to depend upon his employer for the protection or the vindication of his rights. As pointed out above, the School Committee originally joined Belanger in the

Superior Court litigation, but the day after the complaint was filed, the chairman of the School Committee called Belanger's lawyer and asked to be made a party defendant. As previously pointed out, the chairman of the School Committee testified that his reasons for making the switch was that the Union had put pressure on him. How can a School Committee, which has its own peculiar problems and relations with a Union, be viewed as the defender or protector of the rights of a member of that Union?

The Wisconsin Supreme Court indicated that the employer could not be looked to, to protect the rights of the employee, pursuant to the collective bargaining agreement. The Rhode Island Supreme Court disagreed. While the Supreme Court of the United States is not obligated to review conflicting State Court opinions in the same manner that it reviews conflicting opinions in the Federal Courts of Appeal, it seems that where there is such conflict between two cases in point with respect to fundamental issues of due process, the Court should entertain this case.

Clyde Summers, Professor of Labor Law at Yale University, has commented favorably on the *Clark* decision and the position argued by petitioner.

> *Clark* v. *Hein-Werner Corp.*, represents the second type of case—the individual (or group) interest is actively opposed by the union and supported by the employer. Grievances routed in seniority rights are commonly of this character. When the issue is the right of a supervisor to seniority upon return to the production unit, management has a strong interest and may be a vigorous spokesman; but when the issue is simply the order of lay-offs, the transfer or even promotion, management's interest may reach little beyond saving face and back pay. Employees in an organized plant ought not to be compelled to look to

the employer as their defender, and they might understandably have less than full confidence in the employer as counsel. Again, practical problems of proof and the burden of a second proceeding weigh against inquiring into the question whether the employer will adequately represent the employee's interest. Much simpler and more productive of fairness and a sense of fairness is to allow the individual or group to intervene and be heard on their own behalf." 37 N.Y.U. L. Rev. 362, 406-407 (1962).

Courts have not been reluctant to overturn arbitration awards where affected employees have not been formally and properly notified of the proceedings, *Primakow* v. *Railway Express Agency*, 56 F. Supp. 413 (1943); nor have courts been reluctant to grant affected employees the right to intervene in the arbitration process when their interests are not being protected; *In re Iroquois Beverage Corp.*, 159 N.Y.S. 2d 256 (1955). Due process in labor proceedings can never be achieved where an individual loses his rights without representation of his interests.

Rights which an employee has in his job are as real and vital to him as any interest in property. *Thomas* v. *International Association of Machinists*, 258 F. Supp. 235, 240 (1966). If personal property cannot be attached or replevied without affording the property owner the opportunity to protect his interest (*Fuentes* v. *Shevin*, 407 U.S. 67, 92 S. Ct. 1982, 32 L. Ed. 2d 556 (1972)), neither a union nor an employer should be allowed to take away an employee's job without affording that individual an opportunity to protect his interests.

The purpose of the arbitration hearing in the collective bargaining agreement is to provide fair and equitable treatment to the members of the bargaining unit. However, in the instant case, the entire hearing was infected from the

outset. Belanger was denied every aspect and right contemplated by due process of law. He was denied, most fundamentally, an advocate of his own choosing. Belanger was not a party to the proceeding, yet his job was on the line. Belanger's rights were affected at every step of the proceeding, yet he never participated, either procedurally or otherwise, in the determination of the outcome of those rights. He was a witness required to answer questions put to him even though involved was his job. He had no rights to cross-examine or otherwise. The Union obligated to represent him was palpably guilty of unfair representation.

The Supreme Court of Rhode Island affirmed the decision of the Trial Justice that Belanger was denied fair representation by the Union at the hearing. The Court should review this case so that concepts of due process may prevail.

Conclusion

The rulings below reflect an obvious denial of due process of law. For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

SUPREME COURT OF RHODE ISLAND

No. 74-88—Appeal
RICHARD A. BELANGER
v.
ARTHUR B. MATTESON ET AL.

OPINION

KELLEHER, J. This is an appeal from a Superior Court judgment vacating an arbitration award which had been granted under the terms of a collective bargaining agreement between the Warwick Teachers Union Local 915, AFT, AFL-CIO (Union) and the Warwick School Committee (School Committee).

The Union is the exclusive bargaining agent of all the teachers employed by the School Committee. Each year, as a result of negotiations between the Union and the School Committee a collective bargaining agreement is created which governs the conduct of the parties and those whom they represent for the coming year. The controversy in this case concerns, in part, the provisions of the contract which was in force from February 1, 1972 to January 31, 1973.

On June 22, 1972, the School Committee posted a notice of a vacancy for the position of Business Department Head at Warwick Veterans Memorial High School. The vacancy was a "promotional position" within the terms of the contract, and the notice was posted in compliance with its terms. Four teachers applied for the position, including plaintiff and one of the named defendants, Arthur B. Matteson. The candidates were interviewed, and their credentials reviewed by a committee of school administrators composed of the Assistant Superintendent for Secondary Education, the Principal of Veterans Memorial High School, and the Assistant Superintendent for Personnel. This committee unanimously recommended the

appointment of Belanger to the vacant position. Its recommendation was in turn reviewed by the superintendent, who concurred in its decision. Finally, the matter was put before the School Committee who voted to appoint Belanger to the post.

Upon learning that he had been unsuccessful in his bid for the promotion, Matteson met with Mr. Venditto, the Assistant Superintendent in Charge of Personnel to discuss his dissatisfaction. This was his right under art. V, sec. 4(b) of the agreement. He did not obtain satisfaction from this discussion, and thereafter wrote to his union representative and requested the Union to invoke on his behalf the grievance procedures provided in the collective bargaining agreement. The core of Matteson's grievance rested with his belief that the School Committee had violated the agreement by appointing Belanger. Article V, sec. 4(b) provides that, "[c]andidates shall be recommended on the basis of qualifications for the position. Where qualifications are considered equal, seniority in the Warwick School System shall prevail." It is undisputed that Matteson has more seniority than Belanger. Throughout this controversy, Matteson and the Union have insisted that since Matteson was at least as equally qualified for the position as Belanger, the appointment should have been given to the senior person.

The School Committee appointed Belanger on August 1, 1972. On August 7, 1972, the Union filed a written notice of Matteson's grievance with the Assistance Superintendent in Charge of Personnel. The assistant Superintendent met with Matteson and a union representative in early September. On October 11, 1972, he sent Matteson a letter notifying him that his decision was to retain Belanger in the post of department head. The Union followed the grievance procedures set forth in the agreement. It first placed Matteson's cause before the Superintendent and

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then went before the School Committee. Matteson, having had no success at the administrative level, requested the Union to take his complaint to arbitration. The Union met in executive committee and voted to initiate the arbitration.

A hearing was held on April 6, 1973 before three arbitrators, one selected by the School Committee, one by the Union, and the third chosen jointly by both sides from lists prepared by the American Arbitration Association.

The issue submitted to the arbitrators by both sides was: "Has the Committee violated Article V, Section 4(b) of the collective bargaining agreement by not appointing Mr. Arthur Matteson as Business Department Head at Veterans Memorial High School? If so, what shall the remedy be?"

The arbitration hearing lasted from 10 a.m. to approximately 6:30 p.m. A number of witnesses were presented by the Union and the School Committee. Both Belanger and Matteson testified as to their qualifications. All witnesses were subject to cross-examination. Briefs in support of the respective positions were submitted and on August 16, 1973 the arbitrators rendered a decision. They ruled that Matteson was entitled to the appointment as head of the Business Department.

After a full year on the job, Belanger found himself deprived of his promotion and back in the classroom. He wrote to his principal and the Union and requested that a grievance be filed on his behalf as he wished to challence this demotion.

The Union president responded that, although the Union would be happy to file a grievance for him alleging that the School Committee had not adequately represented or protected his interest in his former position as department head, it would not ask for his reinstatement in that position because: "We [the Union] cannot, at this time,

however, ask for a remedy which in effect would reverse a decision which was a result of a grievance filed by the Union. This would be illogical and inconsistent with our role as bargaining agent and our obligation under the contract. We have, after all, agreed to make binding arbitration the final step in our grievance procedure."

Thereafter, Belanger instituted this litigation in the Superior Court. He named as defendants Matteson, the Union, the arbitrators, and the School Committee and asked the court to overturn the arbitrators' decision and reinstate him. His suit was based on 2 grounds: (1) that the arbitrators exceeded their jurisdiction, and (2) that the Union breached its duty to fairly represent his interests when it decided to pursue Matteson's grievance.

The trial justice found that there existed a duty of fair representation which the Union had breached, and that the award was in excess of the arbitrators' power and thus void. He vacated the award, and reinstated Belanger. Matteson and the Union appealed. We will first consider the duty of fair representation facet of this appeal and then go on to discuss the finding that, the arbitrators had exceeded their power by usurping duties and responsibilities which the Legislature has committed to the school committees of the various municipalities and nobody else.

The question of the duty owed by a union to its members is one of first impression in this court. It has, however, been extensively litigated in other jurisdictions, most notably in the federal courts, in cases arising under the National Labor Relations Act, 29 U.S.C.A. § 151 et seq. (1973), the Labor Management Relations Act, 1947, 29 U.S.C.A. § 141 et seq. (1973), and the Railway Labor Act, 45 U.S.C.A. § 151 et seq. (1972).

The first of what has become a long line of cases was *Steele* v. *Louisville & Nashville R.R.*, 323 U.S. 192, 65 S. Ct. 226, 89 L. Ed. 173 (1944). There, the Court held

that the Railway Labor Act, in providing that an organization chosen by the majority of employees would be the exclusive representative of all the employees within its class, mandated a concomitant duty "to act for and not against those whom it represents," and "to exercise fairly the power conferred upon it in behalf of all those for whom it acts * * *." *Id.* at 202, 203, 65 S. Ct. at 232, 89 L. Ed. at 183. This duty has also been found in unions governed by the NLRB. *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 337, 73 S. Ct. 681, 686, 97 L. Ed. 1048, 1057 (1953). By taking away the right of individual employees to further their interests individually or to organize into numerous small units to deal with their employer, Congress has given a union power and control over the working lives of each of its members. A corollary of such power is the duty to act for the benefit of its members.

Our Legislature has created a structure of labor regulations which parallels in many significant respects the federal scheme. Our focus here is G.L. 1956 (1968 Reenactment) § 28-9.3-1 et seq. entitled Arbitration of School Teacher Disputes. Section 28-9.3-1 declares it to be the public policy of this state to grant public school teachers the right to organize, to be represented, and to bargain on a collective basis with school committees relevant to "hours, salary, working conditions and other terms of professional employment." Section 28-9.3-3 mandates that the school committee recognize the labor organization chosen by the teachers to be their "sole and exclusive" bargaining agent. Thus, a labor organization representing teachers of this state has the same broad authority in the negotiation, administration, and enforcement of the collective bargaining agreement as does a union regulated by federal law. We find ourselves in agreement with the persuasive logic of the *Steele* opinion and its progeny, and, therefore hereby recognize, as implicit in our Act, a statutory duty

on the part of an exclusive bargaining agent to fairly and adequately represent the interest of all of those for whom it negotiates and contracts, not only those who are members, but all those who are part of the bargaining unit.[1]

The union and its bargaining unit are necessarily composed of many individuals with diverse views and ofttimes conflicting employment demands. The whole purpose behind the creation of the union is, however, to present a solid, unified front to the employer. "In unity there is strength," went the old organizing slogan, and it was the truth. In dealing with the employer, the union gains its negotiating power from the fact that it speaks with one voice for all the employees.

That we find a duty on the part of the union does not, however, solve the controversy before us. We must define the parameters of the duty, and then apply it to the facts as found by the Superior Court.

We believe at the start that we must recognize that "[a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents * * *." *Ford Motor Co.* v. *Huffman, supra* at 338, 73 S. Ct. at 686, 97 L. Ed. at 1058. Recognizing that the interests of employees are often conflicting, the Court found that the union did not breach its duty to its members by bargaining for a seniority provision in the contract which favored some employees, but caused the layoff of

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[1] General Laws 1956 (1968 Reenactment) §28-9.3-7 provides that teachers shall be free to decline to join an organization even if it is certified as the exclusive representative of all teachers within a unit. The union, however, is still the sole representative for those who choose not to join its organization, and owes them the same duty as it does to dues-paying members. *Steele* v. *Louisville & Nashville R.R.*, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944). We have approved a provision in collective bargaining agreements requiring teachers who are not members of the union to pay their proportionate share of the costs of the benefits conferred upon all members of the bargaining unit. *Town of North Kingstown* v. *Teachers Ass'n*, 110 R.I. 698, 297 A.2d 342 (1972).

others because of their newly lowered position on the seniority lists.

The union must be an advocate for its membership and where its members disagree, the union should not be forced into a neutral position by a court-enforced obligation not to take a stand. In *Humphrey* v. *Moore*, 375 U.S. 335, 84 S. Ct. 363, 11 L. Ed. 2d 370 (1964), a multi-employer union found itself representing the employees of two trucking companies who were merging their businesses. The employees from the dissolved outfit had an interest in retaining their seniority within the absorbing company. That company's employees obviously did not favor such a happening. The contract signed by both employers and the union was ambiguous. The contract question was put before a joint labor-management committee. The union took the side of the absorbed employees, some of the other employees were "bumped" and they sued their union and their employer. The Court, expanding upon the *Huffman* holding, said:

> "Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes. Nor should it be neutralized when the issue is chiefly between two sets of employees. Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes." *Id.* at 349-50, 84 S. Ct. at 372, 11 L. Ed. 2d at 382.

Given these facts of life in the labor-management world, the duty of fair representation which is imposed on the union must not be such as to squelch union advocacy of position, nor must it weaken the union's ability to act when it does for all its members, even those whose interests may not be served but who are nonetheless bound

by the majority vote. The entire scheme of federal and state labor regulations would be pointless if the minority in a union were not bound by the majority will. For example, what would be the efficacy of statutes requiring an employer to bargain *exclusively* with the duly elected union if the minority of employees who voted against ratification of a collective bargaining contract could then turn around and require the employer to contract with them individually.

Whether or not the minority should be bound by the majority in the control of the conditions of their employment is not a matter for us to decide. The Legislature has unequivocally declared that to be the policy and we cannot say otherwise. However, concurrent with the union's power to bind the majority flows the duty which we define today.

In the negotiation process, we hold that a union must make an honest effort to serve the interest of all of its members, without hostility to any, and its power must be exercised in complete good faith and with honesty of purpose. *Ford Motor Co.* v. *Huffman, supra.*

Where the union and the employer have provided by contract for the internal settlement of disputes by means of grievance and arbitration procedures, and where these settlement procedures can be initiated and continued solely by the union, the union is likewise subject to a duty of fair representation in its handling of employee grievances. As in contract negotiations, the union as it deals with grievances must often take a position which is detrimental to some employees as it is helpful to others. The duty upon the Union here is to "* * * in good faith and in a non-arbitrary manner, make decisions as to the merits of particular grievances," *Vaca* v. *Sipes,* 386 U.S. 171, 194, 87 S. Ct. 903, 919, 17 L. Ed. 2d 842, 860 (1967), and, if it decides to pursue a grievance, it must not do so in a perfunctory manner.

Applying these standards of conduct to the facts of this case, we are faced with a clear breach by the Union of the duty it owed to Belanger. The testimony was undisputed, and the trial justice found that throughout the grievance procedure, the Union and its representatives acted without ever contracting Belanger or considering his qualifications for the position; the Union aligned itself with Matteson in seeking Belanger's removal; and at the arbitration hearing the union representatives attempted to demonstrate that Matteson, rather than Belanger, was entitled to the position.

The Union admitted at trial that it had no knowledge of Belanger's qualifications for the contested position until he testified at the arbitration hearing, and that it never contacted Belanger to discuss the impending challenge.

We have said a union may, and often must, take sides. But we wish to make it clear that it must act, when it does, in a nonarbitrary, nonperfunctory manner. Here the Union chose sides totally on the fortuitous circumstances of who the School Committee did not hire. It is true, in a very simplistic sense, that Matteson, being the only member of the bargaining unit with "a grievance," is therefore the only individual in need of Union support. But one would require blinders to accept this view. It should have been apparent to the Union that Matteson's grievance, although theoretically against the School Committee, was in reality against Belanger. Any action the Union took on Matteson's behalf threatened Belanger's job.

The Union had as much of an obligation to support Belanger as it had to support Matteson until such time as it had examined the qualifications of both candidates, and it believed that the seniority clause would control the selection process.

This was clearly a situation that was akin to the situations found in *Humphrey*, *Huffman*, and *Vaca* where a

union faced with conflicting loyalties must make a choice as to which member it will support. To enforce a requirement of neutrality on the union in cases such as this would not, in our opinion, further the purposes of the statute which was designed to strengthen the power of teachers in controlling their employment situation by allowing them all to speak through a single, but strong voice. Neutrality could only weaken the power of employees to deal with their employer. Even if in any particular grievance procedure neutrality would not be harmful,[2] the cumulative effect of such a stance taken over a period of time would undermine the position of the union as employee advocate in its dealings with the employer.

Also, by remaining neutral, the union would lose the ability to control the scope and focus of the arguments made on behalf of the employees. Professor Cox has argued that the settlement of an individual employee grievance involves more than the individual because precedent is established which will control the course of future employer-employee relations.[3] This distinguished educator also points out that any time the parties do battle over their contract, they are also engaging in a process of negotiation over its terms.

The Union must choose its side in a nonarbitrary manner, based on its good-faith judgment as to the merits of the conflicting claims. In the present case the Union never offered Belanger an opportunity to present his case to

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[2] *Cf. Bieski* v. *Eastern Automobile Forwarding Co.*, 396 F.2d 32 (3d Cir. 1968). There, the court found it had jurisdiction to review a decision of a joint committee which the contract provided would be final and binding on the parties. It premised its power to review on the fact that the union had adopted a position of complete neutrality. Because of the unique composition of joint committees, *i.e.*, equal representation by employers and union representatives, neutrality meant that the employer alone made the decision.

[3] Cox, *Rights Under A Labor Agreement*, 69 Harv. L. Rev. 601 (1956).

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them. It never recognized its duty to independently determine whether Matteson or Belanger was entitled to the job. It seems to us that the only fair procedure in this type of a conflict is for the Union, at the earliest stages of the grievance procedure, to investigate the case for both sides, to give both contestants an opportunity to be heard, and to submit their qualifications to the Union. We are not mandating a full-blown hearing, replete with strict rules of procedure and adversary proceedings. If the Union investigates in an informal manner, this would be sufficient so long as its procedure affords the two employees the ability to place all the relevant information before the Union. *See Bures* v. *Houston Symphony Soc'y*, 503 F.2d 842 (5th Cir. 1974); *Waiters Union, Local 781* v. *Hotel Ass'n*, 498 F.2d 998 (D.C. Cir. 1974).

For a union to make a decision affecting its members without investigating the underlying factual situation is a clear breach of the duty of fair representation. *De Arroyo* v. *Sindicato De Trabajadores Packinghouse, AFL-CIO*, 425 F.2d 281 (1st Cir. 1970). In an examination of the union's conduct in its discharge of its duty to the members of the bargaining unit, there are three possible foci for our analysis; the union's motives, its decision-making procedures, and the reasons for its acting as it did. A court's investigation into the first two questions is proper and necessary. We will, however, be more careful in any review of the merits of the Union's decision. An inquiry into the merits would open the way for our substituting our judgment for that of the Union, and that is not our role. It will be enough protection for an employee represented by a union if we inquire into motives and ensure that the union has fairly considered both sides before taking a stand.

In examining the record presented to us, we find no

evidence of bad faith [4] by the Union. However, the Union's decision to press on with Matteson's grievance without making any effort to assess the relative qualifications of the respective candidates was patently defective. Thus, the Union breached its duty to represent fairly the interests of one of its members — Belanger.

Although we reach this conclusion in agreement with the trial justice, we cannot agree with the remedy he fashioned — the overturning of the arbitrators' award. Where the parties to a collective bargaining agreement agree to submit disputes as to the enforcement and effect of their contract to private grievance procedures, culminating in final and binding arbitration, such arbitrators' decisions are, except for a few very limited situations, unreviewable by the courts. *See United Steelworkers of America* v. *American Mfg. Co.*, 363 U.S. 564, 80 S. Ct. 1343, 4 L.Ed.2d 1403 (1969); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S. Ct. 1347, 4 L. Ed.2d 1409 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S. Ct. 1358, 4 L.Ed.2d 1424 (1960). The Legislature has mandated arbitration in conflicts arising in the negotiation process, this arbitration is declared by statute to be final and not appealable unless procured by fraud or in violation of the law. Section 28-9.3-12. The arbitration contemplated by this statute relates to the resolving of the substantive terms that will be part of a new contract. It does

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[4] A number of courts have rejected the requirement that in order to find a breach of the duty of fair representation, the union's conduct must be not only arbitrary but also in bad faith. *De Arroyo* v. *Sindicato De Trabajadores Packinghouse, AFL, CIO*, 425 F.2d 281, 284 (1st Cir. 1970); *Beriault* v. *Local 40, Super Cargoes & Checkers I. L. & W. U., AFL-CIO*, 501 F.2d 258 (9th Cir. 1974); *Gilstrap* v. *Mitchell Bros. Truck Lines*, Ore. , 529 P.2d 370, 375 (1974). We, too, concur in the belief that a requirement of bad faith is an undue restriction on the duty of fair representation.

not embrace the settling of controversies which relate to the terms of an executed contract. This distinction between precontract and postcontract arbitration was pointed out in *Providence Teachers Union, Local 958* v. *School Committee,* 108 R.I. 444, 448, 276 A.2d 762, 765 (1971).

We are dealing here with a situation which arises in the postcontract phase of arbitration.

The trial justice in vacating the award because of the fair representation breach placed great emphasis on the case of *Clark* v. *Hein-Werner Corp., International Ass'n of Machinists, Local 1377,* 8 Wis.2d 264, 99 N.W.2d 132 (1959), where the court promulgated the proposition that "[e]mployees not fairly represented by the union should never be put in the position of having to solely depend upon the employer championing their rights under the collective-bargaining contract." *Id.* at 275, 99 N.W.2d at 138. If the court intended this pronouncement as an absolute, categorical inflexible rule, we cannot subscribe to its principle. There are exceptions to most, if not all, rules and, as will be seen, a union's failure in the area of fair representation does not automatically nullify an arbitration award.

Although owing no fiduciary duty to Belanger, the School Committee nonetheless forcefully argued his position because his and its position were coextensive. We do not have a situation like *Bieski* v. *Eastern Automobile Forwarding Co.,* 396 F.2d 32 (3d Cir. 1968), where the employees challenging the award did not have their position effectively represented. Here the employer and Belanger adopted the same stance before the arbitrators.

The employer has not caused Belanger any harm. The only wrong to Belanger was caused by his Union's breach of its obligation to him. He has a right to use the judicial process to remedy that wrong, but the remedy must be coextensive with the damage occasioned by the breach.

And that damage does not necessarily encompass the loss of his job. The Union could have, consistent with its duty, still found Matteson to be the proper choice for Business Department Head at Warwick Veterans High School. If it had reached such a decision by fair and proper means, the arbitration hearing would still have been conducted, and the award against Belanger would still have been granted. Thus, the Union's wrong here was not the direct cause of the adverse arbitration decision. This is not a situation where the Union's action was the "but-for" cause of Belanger's predicament. We do not now have to resolve the proper remedy for a situation where a union, purporting to represent one of its members in a dispute with an employer, so ineffectively represents the member before an arbitration panel in a case where the employer's position is contrary to the member's and consequently adversely affects him.

Where there has been a fair hearing before duly appointed arbitrators who have by whatever means heard both sides of the controversy and have before them all the relevant information upon which to base a decision, we will not overturn the award.[5]

In *Humphrey* v. *Moore*, 375 U.S. 335, 84 S. Ct. 363, 11 L.Ed.2d 370 (1964), the Court refused to overturn the decision of a joint committee whose decision, according to the contract, was to be final and binding, and in doing so, the Court rejected the employees' contention that even if the union had acted in good faith and was entitled to take the position it had, the employees were deprived of a fair hearing due to inadequate representation of their position. The Court noted that the employees had notice

[5] For a good analysis of the ramifications of finding a breach of the duty of fair representation where the employee's dispute has been arbitrated, see Clark, *The Duty of Fair Representation: A Theoretical Structure*, 51 Tex. L. Rev. 1119, 1167 *et seq.* (1973).

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of the hearing, that they never requested a continuance, and that there was no evidence that they could have added anything to the hearing by way of facts or theory.[6] *Id.* at 350-51, 84 S. Ct. 372, 11 L.Ed.2d 382. It was therefore, " 'idle speculation to assume that the result would have been different had the matter been differently presented.' " *Id.*

The facts in this case mandate a similar conclusion. Belanger was thoroughly conversant with the grievance procedures. Sometime prior to his confrontation with Matteson, he had filed a grievance with the Union against an appointment to the position of Head of the Business Department at another Warwick high school. Belanger subsequently withdrew the grievance. Furthermore, Belanger had been notified of the hearing on Matteson's grievance 10 days before it occurred. The School Committee's representative at the hearing before the arbitrators was Mr. Venditto, the Assistant Superintendent in Charge of Personnel, a gentleman who is no neophyte when it comes to this type of proceeding. It is uncontradicted that prior to the hearing he had summoned Belanger to his office where he and Belanger reviewed the testimony that Belanger would present to show his entitlement to fill the vacancy. At the hearing, Belanger and three other witnesses testified as to his qualifications for the position. He was present during the entire presentation of evidence and in the Superior Court he conceded that there was nothing further which he sought to offer at the hearing which was relevant to his qualifications. Belanger also agreed that at no time did he ever ask that the hearing be postponed or continued so that he could avail himself of the services of an attorney. Matteson appeared and test-

[6] We express no opinion as to whether we would agree with the Court that but for the listed factors, there would have been a violation.

ified at the hearing. Two other witnesses appeared on his behalf. The Union's executive secretary presented Matteson's grievance. The secretary is not an attorney. It is obvious from the record before us that the arbitrators had been presented a thorough and detailed listing of the qualifications and background of each candidate. We perceive no impropriety in the hearing conducted by the aribtrators which would justify the vacating of their award on the basis of the fair representation doctrine.

We would also emphasize that the manner in which this litigation arose differs markedly from that in *Vaca* v. *Sipes, supra,* and the majority of cases which have found a breach of the duty of fair representation. *See, e.g., Margetta* v. *Pam Pam Corp.,* 501 F.2d 179 (9th Cir. 1974); *Steinman* v. *Spector Freight System, Inc., Local 449,* 441 F.2d 599 (2d Cir. 1971). In all of these cases the litigation was essentially an employee's suit against the employer for breach of the collective bargaining agreement. The threshold question to be resolved in each of those cases was whether the employee had exhausted his remedies under the contract to permit him to sue in court. The employee, if he hadn't exhausted his contract remedies, or, in so doing had obtained a final, binding decision, had to overcome this impediment to his private suit. *Vaca* recognized that where the contract remedies are controlled by the union and not the employee, it would be unfair to deprive the employee of a remedy against a wrongful employer where his union had failed to properly and adequately make use of the contract procedures. *Vaca* v. *Sipes,* 386 U.S. 171, 185, 87 S. Ct. 903, 914, 17 L.Ed.2d 842, 855 (1967). To allow a union's intentional or arbitrary failure to defend the employee's rights to bar his one chance to pursue them on his own was termed by the Court "patently unfair." The underlying wrongful con-

duct by the employer should not be immune from correction due to the wrongful conduct of the union.

But those situations are markedly different from the present one. Here we can conceive of no action which Belanger might maintain against his employer. Indeed, initially, Belanger had attempted to have the School Committee enter this litigation on his side as a joint plaintiff. The only breach was by the Union; the arbitrators had Belanger's position aggressively argued and thus, unlike a *Vaca* situation, the Union breach did not foreclose a fair utilization of the contractual remedy; and the employer, who had done no wrong, should not be subjected to a relitigation of the question of who should be the head of the Business Department at Warwick Veterans High School. In *Vaca*, the Court expressly relied on an underlying employer breach to justify its forcing the employer to defend its actions beyond the contractually agreed forums. *Id.* at 196, 87 S. Ct. at 920, 17 L.Ed.2d at 861. In *Humphrey*, the Court also felt constrained to suggest that if the employer knew of the alleged union breach, and there was in fact a breach, it might overturn the arbitrators' decision.

Here, it would be unfair to subject the School Committee to a relitigation of the promotional dispute. If we were to hold otherwise, no employer would be safe in expending time and money in arbitration unless it first assured itself that the Union had not defaulted in its obligation to the employees it represented. This independent investigation into internal union procedures and decision making would be an affront to the union, and a burden on the employer.

It follows from what we have said that the trial justice erred when he vacated the arbitrators' award because of the Union's breach of its duty to represent fairly the interests of all its membership including that of Belanger.

We come now to the trial justice's vacating the arbitrators' award on the ground that they had exceeded their powers.

Within recent years we observed that the General Assembly, when it authorized the teachers to organize and bargain collectively with the respective committees, intended to confer on the teachers many of the well-recognized rights enjoyed by those who work in the private sectors of the economy including the right to have binding arbitration of grievances. *Providence Teachers Union, Local 958* v. *School Committee,* 108 R.I. 444, 448, 276 A.2d 762, 765 (1971). In taking this position, we ruled that the provisions of the School Teachers' Arbitration Act should be considered in conjunction with other relevant labor legislation, to wit, G.L. 1956 (1968 Reenactment) ch. 9 of title 28, which sets up a legislative framework for the arbitration of labor controversies, and consequently we recognized the validity of a clause calling for binding arbitration of grievances. The particular grievance in the *Providence Teachers Union* case related to a provision calling for the payment of severance pay to those teachers who retired during the contract period. What was said about severance pay can certainly be said about grievances concerning promotions.

Section 29-9-18 limits the jurisdiction of the Superior Court to vacate an award on proof of any one of these three specific grounds: (1) "fraud" in the procuring of the award, (2) the arbitrators have exceeded their powers or have so imperfectly executed them that no "mutual, final and definite award" was made, or (3) no valid submission or contract to arbitrate. The trial justice in ruling that the arbitrators had exceeded their powers relied first on G.L. 1956 (1969 Reenactment) §16-2-18 which states that the "selection of teachers" as well as the "entire care, control, and management of all the public school interests * * * shall

be vested in the school committee" and secondly on his finding that the arbitrators had gone beyond the powers because of a purported shifting of the burden of proof by the board at the hearing.

Belanger cites §16-2-18 and then states that the court in *Dawson* v. *Clark*, 93 R.I. 457, 176 A.2d 732 (1962), observed that a school committee could not delegate the jurisdiction conferred on it by the Legislature. He also consistently refers to the filling of the business department vacancy as a "hiring." We acknowledge the presence of the statute and the holding in *Dawson*, but Belanger fails to give its entire holding.

To be precise, the *Dawson* case states that the committee's jurisdiction could not be delegated *in absence of legislative* authority to do so. *Id.* at 461, 176 A.2d at 735. However, assuming the absence of such authority, whoever succeeded to the post of department head is not being *hired*, he is being *promoted*. We think it elemental that the promotional provisions in the collective bargaining agreement envision the advancement of one who has already been hired and a member of the Warwick school system before the vacancy occurred. In such circumstances, you must have a hiring before you have a promotion. While we disagree with most of Belanger's contentions, we agree with his position that the selection process alluded to in §16-2-18 refers to an original hiring. The statutory grant relating to teacher selection does not, in our opinion, encompass within its language, the promotion of one whose performance warrants a "well done" an an advancement within the system.

When in 1975 we look at §16-2-18's language describing the committee's control and management of the school system, we must keep in mind that this statute was passed shortly after the turn of the century (1903) in a day when teachers were more prone to be disciples of John Dewey

than supporters of Samuel Gompers. In reading §16-2-18, one must not forget that some 70 years later the General Assembly in enacting the School Teachers Arbitration Act ordered the school committees of this state to go and sit down at the bargaining table with the representatives of their teachers' union and then negotiate in "good faith" on such matters as hours, salary, working conditions, and "all other terms and conditions of employment." We have no doubt that the Legislature intended that classroom teachers should have the same opportunity of upward mobility as other workers who, because of the promotional provisions of their labor contract, remain on the job and hope that some day because of their superior performance they will move up the employment ladder and assume another and a better-paying position. An undue fixation with the language of §16-2-18 and a failure to broaden one's viewpoint so as to see what the General Assembly did, once the midpoint of this century had been reached, could result in the emasculation of the School Teachers Arbitration Act. The legislative mandate for good-faith bargaining is broad and unqualified and we will not limit its thrust in the absence of an explicit statutory provision which specifically bars a school committee from making an agreement as to a particular term or condition of employment. *Board of Educ.* v. *Associated Teachers,* 30 N.Y.2d 122, 129-30, 282 N.E.2d 109, 113, 331 N.Y.S.2d 17, 23 (1972). When § 16-2-18 and the School Teachers Arbitration Act are placed in their respective time frames, it is obvious that the tightfisted grip which a school committee in 1903 might have held over the day-to-day operations of its schools has been relaxed somewhat when, at its January 1966 session, the Legislature directed such committees to act as responsible public employers; otherwise the goal of affording the advantage of collective bargaining procedures to this particular group of public employees could never

be realized. It follows that the Warwick School Committee was well within its power when it agreed that its promotions of teachers could be subject to review by the arbitrators through the use of the grievance mechanism set forth in the agreement. The arbitrators could therefore properly find a violation of the equal-ability proviso and direct that Matteson be appointed forthwith to the post at the high school.

In considering the trial justice's finding as to the improper shifting of the burden of proof, we will briefly set forth the approach taken by the arbitrators in resolving the controversy. The posted notice informed prospective candidates seeking to be head of the business department that in addition to having the "personal qualifications determined by the administration to be necessary for appointment," they must also possess a "thorough knowledge" of the subjects within the department's area of responsibility which knowledge had been gained by "classroom experience," an "ability to lead teachers and students" to a point where there would be a "high degree of cooperative action and good morale," and finally, an "exceptional ability to plan, develop and evaluate the curriculum * * *." In commenting on the terms of the contract the arbitrators observed that the Union and the School Committee, by their conduct and language in the agreement[7] permitting the grieving of promotions, had contemplated a "reasonable judgment" by the school officials of the candidates' qualifications and a "meaningful review" by the arbitrators of any contested advancement. They then stated that initially

[7] Article III, sec. 1(a) of the contract defines a grievance as a complaint by an employee that "(1) he has been treated unfairly or inequitably, (2) there has been a violation, misinterpretation or misapplication of the provisions of this contract, (3) that his health, safety or liability is jeopardized." In providing for binding arbitration, Art. III, sec. 2(c) specifically empowers the arbitrators to make "appropriate compensatory awards."

it was Matteson's obligation to show that he satisfied the requirements set forth in the notice and that he was senior to Belanger and that once this was accomplished, the School Committee could bring forth the factors which led it to believe that the junior man was superior. The arbitrators, after construing the agreement's reference to instances where equally qualified candidates are under consideration as meaning there was "little to choose between the two," ruled that the reasonableness standard to which we have already alluded required that there be a "material superiority" in the qualifications exhibited by the successful applicant. The arbitrators also remarked that, in showing this degree of superiority, the School Committee could not rely solely on its subjective opinion as to Belanger's attributes but had to point to a factual evidentiary basis which would support a conclusion. Finally, the arbitrators went on to evaluate the evidence in the light of the guidelines they had established and, as is obvious at this point, they found both individuals equally qualified and Matteson, as the senior candidate, entitled to the position.

The trial justice, in his concern for the procedural pattern laid out by the arbitrators and the shifting burdens of proof and persuasion they adopted, has apparently overlooked the fact that an arbitration award is the decision of an extrajudicial tribunal which the parties themselves have created and by whose judgment they have mutually agreed to abide. While we have some doubt as to whether the arbitrators in their thoughtful analysis of the Warwick contract and how they would resolve the problem presented to them did in fact shift the burden of proof, the fact that the arbitration panel may fail to follow the strict legal rules of procedure and evidence is no ground for striking down their award. *Chillum-Adelphi Volunteer Fire Dep't, Inc.* v. *Button & Goode, Inc.*, 242 Md. 509, 518, 219 A.2d 801, 807 (1966). A judicial reversal of an arbitration award

based solely on the reviewing court's disagreement with the arbitrators' interpretation of the contract would not only nullify the bargain made by the parties but also threaten the strong public policy that favors private settlement of grievance disputes arising from collective bargaining agreements. *Goodyear Tire & Rubber Co.* v. *Local Union 200, United Rubber, Cork, Linoleum & Plastic Workers of America,* 42 Ohio St.2d 516, 330 N.E.2d 703 (1975). Except for complete irrationality, arbitrators are free to fashion applicable rules and determine the facts of a dispute before them without their award being subject to judicial revision. *Lentine* v. *Fundaro,* 29 N.Y.2d 382, 385, 278 N.E.2d 633, 635, 328 N.Y.S.2d 418, 422 (1972). As noted earlier, the General Assembly in enacting legislation authorizing the arbitration of disputes involving provisions contained in a collective bargaining agreement restricted the Superior Court's power to vacate an arbitration award to three grounds. A mistake of law is not one of the grounds. Such an omission is clear evidence that an award cannot be challenged on such a ground. *Loretta Realty Corp.* v. *Massachusetts Bonding & Ins. Co.,* 83 R.I. 221, 226, 114 A.2d 846, 849 (1955). We see no reason for faulting the arbitrators for the manner in which they decided to evaluate the evidence presented to them. There has been no excessive use of the arbitrators' power as they determined whether Belanger or Matteson should have been promoted.

The defendant's appeal is sustained, the judgment appealed from is vacated, and the case is remanded to the Superior Court.

Mr. Justice Paolino, concurring in part, dissenting in part. I agree with that part of the court's opinion finding that the Union breached its duty to fairly represent the

interests of Mr. Belanger, but for the reasons that follow I respectfully dissent from the remainder of the court's opinion.

The majority rejects the argument that G.L. 1956 (1969 Reenactment) §16-2-18[1] irrevocably commits to the school committees of the several towns the power to assume the "entire care, control, and management of all the public school interests" including the selection of school teachers. They reach this result on the ground that a more recent statute dealing with a related subject matter, to wit, G.L. 1956 (1968 Reenactment) ch. 9.3 of tit. 28, the School Teachers' Arbitration Act, takes precedence over the older §16-2-18. This precedence, they say, derives from the relative ages of the two statutes, the changes of conditions that the passage of time inevitably works and the general caveat that an "undue fixation" with §16-2-18 would undermine and ultimately eventuate the demise of binding arbitration for teachers. The court therefore is content to interpret the teachers' power to enter into binding arbitration regarding the "terms and conditions of professional employment," (§28-9.3-2) so broadly as to include the power to submit to arbitrators questions of school teacher selection and promotion.

It is indeed settled law in this jurisdiction that a statutory provision which is last in order of time will be preferred over an earlier provision if the two provisions are irreconcilably repugnant. *Surber* v. *Pearce,* 97 R.I. 40,

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[1] General Laws 1956 (1969 Reenactment) §16-2-18 reads as follows:

> "Selection of teachers and superintendent—General control of schools—Expenses.—The selection of teachers and election of superintendent, in such towns as do not unite for the employment of a superintendent, and the entire care, control, and management of all the public school interests of the several towns, shall be vested in the school committee of the several towns, and they shall also draw all orders for the payment of their expenses."

44, 195 A.2d 541, 543 (1963). The majority has offered no proof of such a degree of repugnance between the two statutes here in question and in the absence of a clear mandate from either the Legislature or this court regarding the exact status of teacher selection as a term or condition of employment, I believe it is unwise to create a conflict of such dimension that whole statutes are lost in the backwash. In reading statutes such as this, the court must remain mindful of the principle established in *Providence Teachers Union, Local 958* v. *School Comm.*, 108 R.I. 444, 276 A.2d 762 (1971), a case which coincidentally made the teachers' right to arbitrate coextensive with the rights enjoyed by employees in the private sector. In that case, this court stated:

> "Statutes which are not inconsistent with one another and which relate to the same subject matter are in *pari materia* and should be considered together so that they will harmonize with each other and be consistent with their general object and scope, even though they contain no reference to one another and were passed at different times." *Id.* at 449, 276 A.2d at 765.

Why should this principle not apply to an analysis of the arbitrators' award that is the subject of this appeal in light of §16-2-18? That is, the older statute, dealing with the same general subject matter as relevant portions of the School Teachers' Arbitration Act, does not, on its face, conflict therewith and therefore both statutes should be read in harmonizing fashion. A search of cases and statutory law has failed to reveal any indication that the appointment of teachers (or department heads) was, by the passage of the School Teachers' Arbitration Act, snatched from the purview of §16-2-18 and made the subject of arbitration and award. In view of the clear mandate of §16-2-18 and this court's holding in *Dawson* v. *Clark*, 93 R.I. 457, 176 A.2d 732 (1962) that the school committee's jurisdiction

under that section could not be delegated in the absence of legislative authority to do so, *id.* at 460-61, 176 A.2d at 734-35, I believe that the school committee is not free to delegate its unique jurisdiction over the selection of teachers. To conclude this point, it seems entirely inappropriate to preempt an entire section of the General Laws on the rather meaningless ground that a more modern statute governing related areas has been enacted by the Legislature. Chapter 9.3 of tit. 28 neither expressly nor impliedly abrogates the power conferred upon the school committee by §16-2-18 to appoint teachers. This court is not in the business of repealing statutes. On the contrary, it is our duty to apply statutes according to their original intendment wherever such application is in reasonable conformity with other related statutes.

Keeping in mind the basic notion that it is incumbent upon this court to harmonize statutes wherever possible, I turn now to what I believe to be a proper analysis of the problem presented to us here. The issue in this case could be framed as follows: Is a grievance *arbitrable* when exclusive control over the matter at issue has been statutorily granted to the local school committee? If this quaere is answered in the negative, then any award based on a submission to arbitration of such issues is a nullity. *School Comm.* v. *Curry*, 325 N.E.2d 282, 287 (Mass. App. 1975).

Courts are virtually unanimous in holding that at least some categories of disputes are nonarbitrable by virtue of the fact that a submission of such disputes would constitute a usurpation of the exclusive statutory jurisdiction of the school committees. Comment, *Defining the Scope of Grievance Arbitration in Public Education Employment Contracts*, 41 U. Chi. L. Rev. 814, 816-17 (1974) [hereinafter cited as Comment]. That is, some disputes, being formally designated as matters of management and educational policy, do not properly fall within the ambit of the School

Teachers' Arbitration Act as "terms and conditions of professional employment." Section 28-9.3-2. Essentially, therefore, the court's task is "* * * to accommodate contractual provisions for grievance arbitration to statutes vesting management and control of educational matters in local school boards." Comment, *supra* at 817.

Recent decisions of appellate courts in Massachusetts, *School Comm.* v. *Curry, supra,* and New Jersey, *Dunellen Bd. of Educ.* v. *Dunellen Educ. Ass'n,* 64 N.J. 17, 311 A.2d 737 (1973), together provide an excellent template for decision in the case before us. The *Curry* case involved an appeal from a lower court vacation of an arbitration award which had reinstated a supervisor to a position which had been unilaterally abolished by the school committee. The Appeals Court affirmed, holding that the abolition of the position was "a matter of educational policy within the exclusive managerial prerogative of the school committee." *School Comm.* v. *Curry, supra* at 286-87. In the *Dunellen* case, the Supreme Court of New Jersey held that a school committee decision to consolidate department chairmanships was not reviewable by an arbitration panel in that such a consolidation was "not a proper subject of either arbitration or mandatory negotiation" under New Jersey law. *Dunellen Bd. of Educ.* v. *Dunellen Educ. Ass'n, supra* at 31, 311 A.2d at 744. Each of these courts acknowledged that its goal was to reconcile new labor rights with earlier enactments conferring specified powers on school committees; referred to in the parlance of the laborite as management rights. *School Comm.* v. *Curry, supra* at 284-86, *Dunellen Bd. of Educ.* v. *Dunellen Educ. Ass'n, supra* at 25, 311 A.2d at 741. The underlying presumption of each opinion was that the respective Legislatures of the two states could not have intended, by the passage of arbitration and collective bargaining acts, that local school committees could "abdicate their management responsibilities"

to orchestrate general educational policy. *School Comm.* v. *Curry, supra* at 286. The other side of this argument was forcefully presented by the New Jersey court in stating that the Legislature did contemplate a "statutory responsibility" to negotiate in good faith with employees regarding "* * * matters which intimately and directly affect the work and welfare of their employees." *Dunellen Bd. of Educ.* v. *Dunellen Educ. Ass'n, supra* at 25, 311 A.2d at 741. Clearly, these "matters" are those which are referred to in the arbitration acts as the "terms and conditions of employment" and are to be distinguished from those matters which relate primarily to educational policy. Disputes as to the former are negotiable and arbitrable while disputes as to the latter are neither negotiable nor arbitrable. As the *Dunellen* court noted, the distinction between the two areas of concern is often "shadowy" and the lack of legislative guidance on the matter prevents dispositive rulings by the courts. *Id.* at 25-26, 311 A.2d at 741. The picture is further distorted by the conflicting positions of the teachers, on the one hand, who argue for an expansive reading of "terms and condition of employment" and the school committees, on the other hand, who prefer a narrower reading of the term in order to preserve management prerogatives. *Id.*, quoting *School Dist. of Seward Educ. Ass'n* v. *School Dist.*, 188 Neb. 772, 784, 199 N.W.2d 752, 759 (1972). The Massachusetts court astutely noted that the two areas are not mutually exclusive, that "conditions of employment" and "educational policy" do not denote two definite or distinct areas. Rather, that court stated that " '[m]any educational policy decisions make an impact on a teacher's conditions of employment and the converse is equally true.' " *School Comm.* v. *Curry, supra* at 286, quoting *West Hartford Educ. Ass'n, Inc.* v. *DeCourcy*, 162 Conn. 566, 581, 285 A.2d 526, 534 (1972). It is incumbent upon the courts therefore to render an

interpretation of both terms whenever a matter is presented which does not clearly belong in one class or the other. This chore is best executed on a case-by-case basis in view of the dearth of available guidelines for decision. *Dunellen Bd. of Educ.* v. *Dunellen Educ. Ass'n, supra* at 27, 311 A.2d at 742, citing *West Hartford Educ. Ass'n, Inc.* v. *DeCourcy, supra* at 581, 295 A.2d at 534.

The ultimate outcome of such a categorization, as I stated earlier, is a determination as to whether the matter in issue is arbitrable. An award based on the submission of a dispute regarding educational policy is therefore a nullity whereas a dispute which truly involves "conditions of employment" is entirely arbitrable and the parties are entitled to a judgment on an award arising from such a dispute.

I turn now to a consideration of the specific issue in this case. In my view of the facts before us, we must decide whether the promotion of a school teacher to the position of department head by a school committee which has made an informed judgment as to that teacher's personal qualifications concerns the conditions of employment for teachers in the school district and thus is properly reviewable by an arbitration panel. I believe that it is not reviewable and my position finds support in the case of *Board of Educ.* v. *Rockford Educ. Ass'n,* 3 Ill. App. 3d 1090, 280 N.E.2d 286 (1972). The facts are similar to the case at bar. In 1969, the Board of Education for the City of Rockford, Illinois, created the promotional position of Director of Personnel and Recruitment and invited applications for said position from instructional staff members by posting an "Announcement of Vacancy." One particular guidance counselor along with several other of his colleagues informed the board of his interest in the position and made application therefor. The guidance counselor was recommended for the post by the superin-

tendent of schools but later in the year the board rejected all applications and declined to fill the vacancy. In October 1969, the counselor initiated grievance proceedings alleging, among other things, that the board had improperly failed to promote him to the position of Director of Personnel and Recruitment. After meeting with no success at the initial stages of the procedure the issue was submitted by the counselor and the association to arbitration. The board specially appeared before the arbitrator to argue that the "* * * matter of selection or employment of employees was not intended to be included in the Professional Agreement and could not, in any event, be delegated by the Board and, therefore, it was not an arbitrable issue." *Id.* at 1092, 280 N.E.2d at 287. This question was considered by the arbitrator who concluded that the issue was arbitrable and set it down for hearing. The trial court considered the matter and set aside the arbitrator's award regarding the question of arbitrability and held that those portions of the agreement relating to arbitration of "matters of selection or promotion of employees" were null and void. *Id.* The appellate court affirmed this ruling stating that

> "* * * a board may not, through a collective bargaining agreement or otherwise, delegate to another party those matters of *discretion* that are vested in the board by statute." *Id.* at 1093, 280 N.E.2d at 287 (Emphasis added.)

Illinois has a statute which provides that the board has the duty "[t]o appoint all teachers and fix the amount of their salaries." Ill. Rev. Stat. ch. 122, §§10-20 and 10-20.7 (Smith-Hurd Supp. 1975). Under this provision the court was compelled to hold that although the agreement prescribed a promotional policy and procedure, such appointments were to be made on the basis of individual qualifications. "The ultimate determination of 'qualification,' " the

court held, "was not, nor could it be, delegated by the Board to any outside agency including the American Arbitration Association." *Board of Educ.* v. *Rockford Educ. Ass'n, supra* at 1094, 280 N.E.2d at 288. The issue was not arbitrable.

The present case lends itself to a similar line of reasoning. The plaintiff Belanger was recommended and appointed Chairman of the Business Department at Warwick Veterans Memorial High School. Subsequently, as a result of arbitration[2] which culminated a grievance procedure initiated by defendant Matteson and the Warwick Teachers' Union, Belanger was replaced by Matteson in accordance with the terms of the arbitrators' award. In my view of these facts, it is important to note at this point that after an initial determination by an evaluating committee appointed by the Superintendent of Schools that Belanger was most fit among the applicants to assume the disputed position, that determination was affirmed at each step of a four-step grievance procedure. That is to say, the employee's immediate supervisor, the Assistant Superintendent in Charge of Personnel, the Superintendent of Schools and the school committee all concurred in the decision that Belanger should fill the post. Belanger, pursuant to the terms of the announcement, was found to have the "*personal qualifications* determined by the administration to be necessary for appointment." This satisfied art. V, sec. 4(b) of the agreement which reads:

"ARTICLE V

Promotional Policy

"Section 4. Application

* * *

"(b) Candidates shall be recommended on the basis

[2] It is important to note that plaintiff Belanger was not himself a party to the arbitration. The arbitrators' award was the product of a submission by the teachers' union (representing defendant Matteson) and the school committee.

> of qualifications for the position. Where qualifications are considered equal, seniority in the Warwick School System shall prevail."

Because Belanger was considered to have superior qualifications, the fall-back criterion of Matteson's seniority in the system was never reached by the administration. The arbitrators, however, in the opinion written by the chief arbitrator, embarked upon a reevaluation of the administration's findings. They created their own standards of superiority, applied them to plaintiff's case and reached their own de novo conclusion that the qualifications of the two candidates were "roughly equal." Having reached this point they simply applied the seniority criterion and in their award held that "Matteson is entitled to the appointment forthwith."

In these circumstances it is my opinion that the school committee, by permitting the submission of this matter to arbitration, unlawfully delegated the discretionary authority that has been entrusted to it by statute.

> "The doctrine of the illegal delegation of power * * * is a constitutional doctrine which sometimes forbids government from sharing its powers with others. The doctrine of illegal delegation commands that certain discretionary decisions be made solely on the basis of the judgment of a designated official." Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 Yale L. J. 1107, 1109 (1969).

In the present case, the commitment of discretionary judgment to the school committee on matters of hiring and promotion derives from several sources. The most important, of course, is §16-2-18, discussed above, which provides that "[t]he selection of teachers * * * shall be vested in the school committee." Similarly art. XVI of the agreement is the parties' own acknowledgement that

"the School Committee possesses the sole right to * * * [h]ire, assign or transfer teachers." Finally, art. V, sec. 4(b) of the agreement entrusts to the administration the power to exercise its discretion in forwarding recommendations for promotion. While these two items from the agreement have no legal effect other than directly on the parties, they indicate the parties' acknowledgment and acceptance of the nondelegable nature of the school committee's discretionary authority.

To conclude and to relate this to earlier discussion, the fundamental question here is whether the decision to promote Belanger was a matter of educational policy (committed to school committee discretion) or a matter affecting the terms and conditions of employment (fully arbitrable). In view of the extreme importance of personal qualifications as a condition for advancement and the fact that the school committee made a studied evaluation of the same, it appears to me that the arbitrators were permitted to venture beyond the proper scope of their authority in substantively reviewing the committee's decision. Where an appointment or promotion is to be based on qualification, the final determination of that criterion is not delegable by the school committee to any outside agency, including arbitrators. *Board of Educ.* v. *Rockford Educ. Ass'n, supra* at 1093-94, 280 N.E.2d at 288.

In view of the foregoing, I would conclude that the matter was not arbitrable and that the arbitrators' award, ordering the installation of defendant as department head, was a nullity.

I find the majority's opinion to be disturbing in yet another respect. That is, even if the issue submitted to the arbitrators was in fact attributable, I believe that the arbitrators in reaching their decision exceeded their powers

to a degree sufficient to render their award unenforceable. General Laws 1956 (1968 Reenactment) §28-9-18(b).[3]

To determine if an arbitrator exceeded his powers it is, of course, necessary to establish what his powers are. The classic exposition of this point was offered by Mr. Justice Douglas writing for the Court in *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960):

> "* * * [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement." *Id.* at 597, 80 S.Ct. at 1361, 4 L.Ed.2d at 1428.

The arbitrator therefore is confined to interpreting the agreement so as to fulfill the intentions of the parties. His power is created by the parties when the agreement of submission is entered into and the parties are free to limit those powers by agreement. *Norwich Roman Catholic Diocesan Corp.* v. *Southern New England Contracting Co.*, 164 Conn. 472, 476-77, 325 A.2d 274, 276 (1973). It is incumbent upon the court in these matters to measure the award against the grant of power. One yardstick that has been suggested as an aid to such measurement is the assumption that

> "* * * absent an express provision in the contract

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[3] General Laws 1956 (1968 Reenactment) §28-9-18, reads in part, as follows:

> "Grounds for vacating award.—In any of the following cases, the court must make an order vacating the award, upon the application of any party to the controversy which was arbitrated.
>
> * * *
>
> "(b) Where the arbitrator or arbitrators exceeded their powers * * *."

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> to the contrary, the parties intended that the arbitrator should not be enabled to make an irresponsible award at variance with any possible construction of the contract * * *. This being assumed, the question for the court is whether the construction of the contract made by the arbitrator is a reasonably possible one that can seriously be made in the context in which the contract was made. Stated affirmatively, if all fair and reasonable minds would agree that the construction of the contract made by the arbitrator was not possible under a fair interpretation of the contract, then the court would be bound to vacate or refuse to confirm the award." Pirsig, *Some Comments on Arbitration Legislation & the Uniform Act,* 10 Vand. L. Rev. 685, 706 (1957), cited in *University of Alaska* v. *Modern Constr., Inc.,* 522 P.2d 1132, 1137 n. 12 (Alas. 1974).

It is conceded that judicial review of arbitrators' decisions is limited, yet the proper judicial remedy where an arbitrator exceeds his power by giving "perverse misconstruction" to the collective bargaining agreement, is vacation of his award. *W. M. Girvan, Inc.* v. *Robilotto,* 40 App. Div.2d 1060, 1061, 338 N.Y.S.2d 950, 953 (1972); General Laws 1956 (1968 Reenactment) §28-9-18. *See generally Board of Educ.* v. *Champaign Educ. Ass'n,* 15 Ill.App.3d 335, 340, 304 N.E.2d 138, 141-42 (1973).

Applying these principles to the case at bar, I conclude that the arbitrators exceeded their powers in reaching their conclusion that Matteson and not Belanger was entitled to the appointment. While the arbitrators were free to interpret the agreement as it applied to promotional policy, they were not free to render a reading that was clearly contrary to the plain meaning of the contract. *Livingston* v. *Tel-Ant Electronic Co.,* 4 Misc.2d 600, 605, 138 N.Y.S.2d 111, 117 (1955). The plain meaning of art. V, sec. 4(b) of

the agreement is that the emphasis in promotional matters is to be the personal qualifications of the candidate. Seniority within the school system is clearly framed as a fall-back criterion in the event of equal qualification between candidates. The arbitrators, however, in requiring that the school committee meet a renewed burden of proof that the plaintiff had superior qualifications and that the defendant show only that he was Belanger's senior, reversed the burdens of proof that the agreement anticipated. The arbitrators in this case should have required Matteson and the union to come forth with facts indicating that the committee's decision was unreasonable. Where an agreement prescribes an elaborate four-step grievance procedure it surely does not contemplate a *de novo* review by an arbitration panel whose expertise may as likely as not lie in some field totally unrelated to education. The arbitrators' function, especially in a situation where personal qualities are of utmost concern, is not to rehash the very basic considerations presented to the original evaluating committee for their seasoned judgment. Their function, as noted above, is simply to review the previous findings and the contract provisions in equal light and to determine whether the former contravene the parameters set out by the latter. In this case, the arbitrators overstepped their bounds and propounded findings that went to the basis of the decision rather than to its contractual appropriateness and its procedural correctness. It placed too onerous a burden on the school committee when the committee had already met its proper burden at every step of the promotion and grievance process.

I would find that this constituted a "perverse misconstruction" of the terms of the agreement and warrants the vacation of the award. The arbitrators plainly exceeded their powers. Consequently, §28-9-18(b) provides that the award must be vacated.

SUPREME COURT OF RHODE ISLAND

No. 74-88-Appeal.

RICHARD A. BELANGER

v.

ARTHUR B. MATTESON ET AL.

ORDER

Petition for reargument denied.

Entered as the order of this court this 13th day of November, 1975.

BY ORDER,

(s) BRIAN D. BURNS, *Deputy Clerk*

WALTER J. KANE, *Clerk*

ENTER:

(s) THOMAS H. ROBERTS

THOMAS H. ROBERTS, *Chief Justice*

November 13, 1975

EXCERPTS OF BRIEF OF RICHARD A. BELANGER
Filed in Rhode Island Supreme Court

* * *

B. The Failure of the Union To Fully, Fairly and Properly Represent Plaintiff Required the Court To Vacate the Arbitrators' Award.

Appellants contend that plaintiff's principal attack on the arbitration award is that plaintiff was denied "due process" at the arbitration hearing. (See page 25 of Appellants' brief.) Appellants have misconceived and distorted the legal contention made by the plaintiff and the legal and factual conclusions reached by the Trial Justice. As discussed in the previous section, the plaintiff established with evidence at trial that the Union violated its duty to represent all members in the bargaining unit fairly.

This fiduciary duty of fair representation is a well-settled principle of law. *Vaca* v. *Sipes*, 386 U.S. 171, 81 S.Ct. 903, 17 L.Ed.2d 842 (1967). See Cox, "Rights Under a Labor Agreement," 69 Harv.L.Rev. 601, 638 (1956). Notwithstanding this obligation, the Union throughout the entire grievance procedure aligned itself with Matteson and sought the removal of the plaintiff from the position to which he had been promoted. It chose to represent one member of the bargaining unit whose interests were totally adverse to the interest of another member of the bargaining unit. The undisputed finding of the Trial Justice was that the Union's conduct toward plaintiff was arbitrary and discriminatory. As such, plaintiff contends that the breach of the Union's duty of fair representation required the court to vacate the arbitrators' award.

The Wisconsin Supreme Court squarely faced the issue of a Union's duty when two members or groups of members of the bargaining unit have interests which are at odds to one another.

In *Clark* v. *Hein-Werner Corp.*, 8 Wis.2d 264, 99 N.W.2d 132 (1959), *reh. den.* 100 N.W.2d 317 (1960), certain members of a union had been promoted out of the bargaining unit to supervisory positions. However, the employer demoted these individuals and transferred them back to the bargaining unit which resulted in certain layoffs of other employees. Those employees laid off grieved the decision and the union, representing those laid off, took the grievance to arbitration. The issue in arbitration was whether the former supervisory employees could count their time in their supervisory capacities in computing seniority. The arbitrator said they could not and restored those laid off to their former positions. The former supervisory personnel sued to enjoin the enforcement of the arbitrator's award. The trial court held that the employees had property interests in their seniority rights and since the former supervisory personnel were not given notice of the arbitration hearing and were not given the opportunity to participate in that hearing, their property rights had been taken away from them without due process of law. Consequently, the trial court enjoined the enforcement of the award. The union appealed by the Wisconsin Supreme Court affirmed.

In its opinion, the court found that the union violated its duty of fair representation to the former supervisory personnel. Addressing the problem of a union's duty when the interests of its members are opposed, the court said:

> "We deem such test of fair representation, in determining when to grant court protection to the rights of an individual employee under the collective bargaining contract, to be sound in principle and we adopt the same. In most situations whether the union is performing its fiduciary duty of fair representation in an arbitration proceeding presents a question of fact. *However, where the interests of two groups of em-*

ployees are diametrically opposed to each other and the union espouses the cause of one in the arbitration, it follows as a matter of law that there has been no fair representation of the other group. This is true even though, in choosing the cause of which group to espouse, the union acts completely objectively and with the best of motives. The old adage, that one cannot serve two masters, is particularly applicable to such a situation.'' 99 N.W.2d at 137, emphasis added.

The court also found that the employees should not have to rely on their employer to espouse their cause in arbitration. It said:

> "The union advances the further argument that plaintiffs' rights were adequately represented before the arbitrator because the employer's position in the arbitration proceedings was identical to that of the plaintiffs. While such contention might be material on the issue of due process, we deem it to be beside the point on the issue of whether the plaintiffs were entitled to notice of the hearing, and an opportunity to intervene, as a matter of sound labor policy. Employees not fairly represented by the union should never be put in the position of having to solely depend upon the employer championing their rights under the collective bargaining contract.'' 199 N.W.2d at 138.

The Trial Justice, in the instant case, relied on this quotation to reject the appellants' contention that the School Committee adequately represented the plaintiffs' interest (see paragraph 11 of Findings of Fact at Appendix p. B-3).

The court in *Clark* indicated that the employees had sufficient property rights which could not be divested under the circumstances of that case. However, the court did not base its decision on the constitutional question of due process. Rather, the court decided as a matter of law that the Union had breached its duty of fair representation and

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it relied on its equity power "to grant relief in situations which offend the court's sense of justice and fair play."

Defendants have attempted to distinguish *Clark* on the grounds that in that case the employees were not present at the arbitration hearing and had no notice of such hearing, whereas, in the instant case, Mr. Belanger was present and did participate as a witness. The majority opinion in the *Clark* case does not say whether or not the plaintiffs in that case had been present at the arbitration hearing. However, a reading of the dissent in that case indicates that the plaintiffs were aware that a grievance had been filed and that it was going to arbitration. The majority evidently found that mere knowledge of a fact that a grievance was going to arbitration is insufficient to constitute fair representation. The case stands for the proposition that knowledge of the arbitration does not suffice in cases of this kind but that the overriding and sole question is fair representation of all members of the bargaining unit. When, as here, two members contest for the same position, the decision to represent one against the other, by the very nature of such decision, compels the court to conclude that the Union defaulted in its duty of fair representation.

Defendants also contend that the *Clark* case represents a minority view. To support their contention they cite the case of *O'Brien* v. *Curran,* 209 A.2d 723 (N.H. 1965). In that case a trucking company acquired several other trucking companies. At issue was whether the employees of the acquired companies were to be put at the foot of the seniority list or whether the seniority lists of the various companies were to be dovetailed. At arbitration, the Union contended that the contract called for the employees of the new companies to be put at the foot of the seniority list. The arbitrators agreed.

The employees of the acquired companies petitioned the

New Hampshire Superior Court to set aside the arbitration award and they relied on the *Clark* case. The New Hampshire Supreme Court said that the *Clark* case represented a minority view. However, as authority for their position that the *Clark* case was a minority view, the New Hampshire Supreme Court only cited one case. The case cited was *Bailer* v. *Local 470 International Teamsters,* 400 Pa. 188, 161 A.2d 343 (1960). This case, however, does not mention the *Clark* case and does not present any issue which was similar to that in the *Clark* case. Consequently, the Supreme Court of New Hampshire erred when it cited this case for the proposition that the *Clark* case represents a minority view. In fact, *Clark* is cited with approval in numerous cases including *Acuff* v. *United Papermakers,* 404 F.2d 169, 171 (1968); *DeMarco* v. *Thatcher Furnace Co.,* 102 N.J.Super. 258, 245 A.2d 773, 780 (1968); *Donnelly* v. *United Fruit Co.,* 40 N.J. 61, 190 A.2d 825, 835 (1963).

Moreover, *O'Brien* v. *Curran,* on the facts, is distinguishable from the instant case. Plaintiff does not dispute that there are certain issues where the Union must represent the interests of the entire bargaining unit. For example, when there is a necessity to interpret the meaning of a provision in the collective bargaining contract, the Union is the proper party to represent the bargaining unit. That was the situation in the New Hampshire case. At issue, was the interpretation of the contract to resolve how seniority would be determined. Similarly, when there is a matter that affects all members of the bargaining unit, the Union is the proper party to go to arbitration. For example, if the Warwick School Committee attempted to refuse to pay all teachers a day's pay, the Warwick Teachers' Union would be the proper party to contest that action.

However, in the instant case, the issue did not affect all members of the bargaining unit and the issue did not call

for an *interpretation* of the Collective Bargaining Agreement, rather the issue called for an *application* of the contract. In the instant case, the conflict was not between the Union and the employer, but rather it was a conflict between two employees. At issue were the conflicting rights of two members of the bargaining unit. Plaintiff contends that where two employees, both members of the bargaining unit, have interests which conflict, the Union cannot side with one employee without breaching its duty of fair representation to the other.

The Union argues that it applied the machinery of the Collective Bargaining Agreement and that in that agreement with the School Committee, there is no provision protecting the rights of two members of the bargaining unit where those rights are adverse to one another. The Union argues, therefore, that its compliance with the form of the agreement is sufficient answer to Mr. Belanger's complaint that he was not fairly represented. This is not the law and a court of equity is empowered to guarantee the safeguarding of the rights of all the parties, including Mr. Belanger, notwithstanding the failure of the Collective Bargaining Agreement to address itself to a situation of this kind. Moreover, nothing in the agreement prevented the Union from taking a neutral position and assuring that the rights of both Mr. Belanger and Mr. Matteson were protected.

Since Mr. Belanger and Mr. Matteson were both members of the collective bargaining unit and the Union had an equal duty to protect the interests of each, it is interesting to compare what took place throughout this process. Mr. Matteson was able to consult with the Union at each and every step of the grievance process. He was afforded assistance in making sure that his assertions were properly made. The weight of the Union was always behind him. The Union selected one arbitrator and had a voice in select-

ing the third. Mr. McElroy prepared his case and represented him at the arbitration hearing. Mr. McElroy, who was very experienced in conducting arbitration cases, cross-examined each and every witness presented by the School Committee, including Mr. Belanger. Mr. McElroy filed a well-written brief in Mr. Matteson's behalf. In short, the Union put all its effort into winning for Mr. Matteson, Mr. Belanger's job.

On the other hand, Mr. Belanger had no representation. He was never informed of the different steps that Mr. Matteson was taking in the grievance machinery. He was only allowed to appear as a witness in the arbitration proceeding. He was not made a party to that proceeding, yet his rights were as much, if not more, at stake than those of Mr. Matteson.

Plaintiff was simply a witness at the arbitration hearing. A witness can only answer the questions propounded to him, and being a witness cannot be a substitute for being allowed to present a case to support one's contentions. Plaintiff by not being a party to the arbitration proceeding had no way to protect his interests. He had no voice in the selection of the crucial impartial arbitrator, he had no right to present witnesses, he had no right to cross-examine witnesses, he had no right to argue the law and the facts to the arbitrators, and he had no right to file memoranda in support of his position. In short, he was denied every fundamental right which due process of law was intended to guarantee. He was denied the right to protect his interests. His Union, which had a duty to represent him, was seeking to take his job away and it did not inform him of its activity or of a way in which he might defend his own rights. While the School Committee sought to sustain its decision, it was not the protector of plaintiff's rights and interests. As the very posture of this case indicates, an employer can be a short-lived ally and no employee

should be forced to depend upon his employer for the protection or the vindication of his rights. As indicated above, the Trial Justice rejected the appellants' contention that the School Committee adequately protected Mr. Belanger's interests.

Defendants contend that if Mr. Belanger were made a party in this type of arbitration proceeding it would create havoc within the grievance machinery. This is not true. Clyde Summers, Professor of Labor Law at Yale University, has commented favorably on such procedural prerequisites.

> "*Clark* v. *Hein-Werner Corp.*, represents the second type of case—the individual (or group) interest is actively opposed by the union and supported by the employer. Grievances rooted in seniority rights are commonly of this character. When the issue is the right of supervisors to seniority upon return to the production unit, management has strong interests and may be a vigorous spokesman; but when the issue is simply the order of layoffs, transfer or even promotion, management's interests may reach little beyond saving face and back pay. Employees in an organized plant ought not to be compelled to look to the employer as their defender, and they might understandably have less than full confidence in the employer as counsel. Again, practical problems of proof and the burden of a second proceeding weigh against inquiring into the question whether the employer will adequately represent the employee's interest. Much simpler and much more productive of fairness and a sense of fairness is to allow the individual or group to intervene and be heard on their own behalf." 37 N.Y.U. L. Rev. 362, 406-407 (1962)

The instant court proceeding could have been avoided totally if the Union had met its duty at the outset to

Mr. Belanger. The Union should have gone to Mr. Belanger after learning of Mr. Matteson's grievance and indicated that Mr. Matteson was seeking to get Mr. Belanger's job. The Union should have said to both Mr. Matteson and Mr. Belanger that whereas they were both members of the bargaining unit and whereas the Union had an equal duty to each of them that the Union would leave it to each of them to resolve this problem. The Union should have been a neutral party assuring that proper procedures were set up so that Mr. Matteson could make his claim while Mr. Belanger could protect his rights. The Union chose not to do this. Instead, they chose to be the advocate for Mr. Matteson and they chose not to be concerned with the rights of Mr. Belanger. As such they violated their duty of fair representation.

Not only was Mr. Belanger not fairly represented by the Union, but he was deprived of all due process rights in the arbitration hearing. Courts have not been adverse to overturning arbitration awards where affected employees have not been formally and properly notified of the proceedings. *Primakow* v. *Railway Express Agency*, 56 F. Supp. 413 (1943). Nor have courts been reluctant to grant affected employees the right to intervene in the arbitration process when their interests are not being protected. *In re Iroquois Beverage Corp.*, 159 N.Y.S.2d 256 (1955). Justice in labor proceedings can never be achieved where an individual loses his rights without representation of his interest. Requiring adequate representation and neutrality on the part of the Union will in no way interrupt or hinder the efficient operation of the grievance procedure. Rather such requirements make the arbitration procedings fairer and minimize collateral attacks on the arbitration award.

Rights which an employee has in his job are as real and vital to him as any interest in property. *Thompson* v. *International Association of Machinists*, 258 F.Supp. 235,

240 (1966). If personal property cannot be attached or replevied without affording the property owner the opportunity to protect his interests (*Fuentes* v. *Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972)), neither a union nor an employer should be allowed to take away an employee's job without affording that individual an opportunity to protect his interest. In addition, in the instant case, plaintiff was protected by the Teachers' Tenure Act so that the School Committee could not have removed him without giving him an opportunity to protect his interests. Therefore, why should the Union and the School Committee by agreeing to submit a matter to arbitration, initiate the step which removed the plaintiff from his position without any opportunity to protect his rights?

In summary, on the basis of the undisputed evidence, the undisputed findings of fact and the law, the Union pursued a course of action in the grievance procedure which breached its fiduciary obligations to the plaintiff. As such, the Trial Justice was correct in vacating the arbitrators' award.

C. The Arbitrators Exceeded Their Powers in Reaching Their Decision so as To Require the Court To Vacate the Arbitrators' Award.

The appellants contend that the judgment of the court below should be overturned because the Trial Justice erroneously concluded that the instant matter was not proper for arbitration. Appellants cite numerous cases, though none precisely in point, for the proposition that an arbitration panel may review a promotional decision of a school committee even though state statute vests the school committee with exclusive authority in hiring and promoting teachers. While this presents an interesting legal question, it is not one that is before this court on

* * *

STATE OF RHODE ISLAND
SUPERIOR COURT

KENT, SC.

M.P. No. 73-29
RICHARD A. BELANGER
v.
ARTHUR B. MATTESON, WARWICK TEACHERS UNION, LOCAL 915, AFT, AFL-CIO, WARWICK SCHOOL COMMITTEE, WILLIAM TAMMELLEO, WILLIAM J. TOOHEY and DANIEL G. MAC LEOD, in their capacities as Arbitrators in Case Number: 1139-0036-73

JUDGMENT

This action came on for trial before the Court, Mr. Justice Mullen, presiding, and the issues having been tried and a decision having been duly rendered whereby the Court has determined the following:

FINDINGS OF FACT

1. On June 22, 1972, the defendant, Warwick School Committee, posted a notice of vacancy for the position of Business Department Head at Warwick Veterans Memorial High School (hereinafter referred to as "the position").

2. An Evaluating Committee, appointed by the School Committee, and the Superintendent of the Warwick School Department, unanimously recommended the plaintiff for the position and the School Committee, after an independent review of the applicants, appointed plaintiff to the position on August 1, 1972.

3. Defendant, Arthur B. Matteson, an unsuccessful candidate for the vacancy, notified the defendant Union that he wanted to grieve the decision of the School Committee appointing plaintiff to the position of Business Department Head.

4. Plaintiff and Matteson were both members of the Union.

5. The Union pursued on Matteson's behalf steps 2, 3 and 4 of the grievance procedure as set forth in its collective bargaining agreement with the School Committee. At each step, the Union and Matteson were turned down.

6. The Union's Executive Board voted to take Matteson's grievance to arbitration. This decision was made on the recommendation of Edward McElroy, Executive Secretary of the Union.

7. Throughout the grievance procedure, the Union and its representatives acted without ever contacting plaintiff or considering his qualifications for the position.

8. At the arbitration hearing held on April 6, 1973, McElroy presented the case for the Union and Matteson. McElroy attempted to demonstrate that Matteson, rather than plaintiff, was entitled to the position. At the hearing, McElroy cross-examined the School Committee's witnesses, including the plaintiff, and he subsequently filed a brief on behalf of Matteson.

9. Throughout the grievance procedure, the Union and the School Committee waived established time limits which were set out in the contract without ever obtaining the assent of the plaintiff to any such waiver.

10. Notwithstanding the Union's obligation to treat its members fairly, it totally aligned itself with Matteson and sought the removal of the plaintiff from the position to which he had been promoted. The conduct of the Union was arbitrary and discriminatory towards the plaintiff in that moving side by side with Matteson through every step of the grievance machinery, the Union's sole regard was for the rights and interests of Matteson and it labored affirmatively against the rights and interests of the plaintiff.

11. It has been suggested that Mr. Belanger was re-

presented at the arbitrators' hearing by the School Committee. Pertinent to this is the following quotation:

> "Employees not fairly represented by the Union should never be put in the position of having to solely depend upon the employer championing their rights under the collective bargaining contract." *Clark* v. *Hein-Werner Corp.*, 99 N.W.2d 132, 136 (Wisc. 1949).

12. The Board of Arbitration concluded that Matteson and not the plaintiff should have been appointed. Consequently, plaintiff was replaced by Matteson as Business Department Head at Warwick Veterans Memorial High School.

13. The collective bargaining agreement between the Union and the School Committee as it relates to promotions reads as follows:

> "Candidates shall be recommended on the basis of qualifications for the position. Where the qualifications are considered equal, seniority in the Warwick school system shall prevail."

14. The Board of Arbitration improperly shifted the burden of proof to the School Committee requiring it to prove affirmatively the reasonableness of its judgment that plaintiff had superior qualifications. Rather, the burden should have been placed upon the Union to prove that the School Committee erred in selecting the plaintiff.

15. The Board of Arbitration in reaching its decision exercised the authority vested exclusively in the School Committee as to the selection and promotion of teachers.

16. The decision of the Board of Arbitration was not procured by fraud.

Conclusions of Law

1. The defendant Union breached its duty to fairly represent the plaintiff.

2. The plaintiff was denied his right to fair representation at the arbitration hearing.

3. The Board of Arbitration exceeded its power in causing the dismissal of the plaintiff from the post of Business Department Head of Warwick Veterans Memorial High School and the appointment of defendant Matteson in his place and stead.

4. The Board of Arbitration acted in violation of law because the plaintiff was denied his right of fair representation at the arbitration hearing.

It is, therefore, ORDERED and ADJUDGED:

1. That the decision and award of the arbitrators in American Arbitration Case No. 1139-0036-73 in the Matter of Arbitration between Warwick Teachers Union, Local 915, AFT, AFL-CIO and Warwick School Committee is hereby vacated.

2. That the defendant School Committee shall forthwith restore and appoint plaintiff to the position of Business Department Head at Warwick Veterans Memorial High School and pay him the incremental salary for said position from the date he was removed from that position.

Dated at East Greenwich, Rhode Island, this 20th day of March, 1974.

(s) ILLEGIBLE
Deputy Clerk

ENTER:

(s) MULLEN, J.
3-20-74

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
SUPERIOR COURT

KENT, SC.

M.P. No. 73-29
RICHARD A. BELANGER
v.
ARTHUR B. MATTESON, WARWICK TEACHERS UNION, LOCAL 915, AFT, AFL-CIO, WARWICK SCHOOL COMMITTEE, WILLIAM TAMMELLEO, WILLIAM J. TOOHEY and DANIEL G. MAC LEOD, in their capacities as Arbitrators in Case Number: 1139-0036-73

DECISION

MULLEN, J. On June 22, 1972, pursuant to *Article 5, Section 2A* of an agreement between defendant Warwick School Committee and defendant Warwick Teachers Union, notice of a vacancy in a promotional position (Business Department Head) was posted for the information of those who might be interested.

Four candidates applied for this vacancy including the plaintiff, Richard A. Belanger, and the defendant, Arthur B. Matteson. The other two applicants did not persist, one of them being in the hospital at the time.

Following custom in such situations the Superintendent of Schools appointed an Evaluating Committee to review the applications, interview the candidates and make recommendations to the Superintendent. Such a committee was established consisting of Clyde Bennett, Assistant Superintendent for Secondary Education, Christopher H. Rallis, Veterans Memorial High School Principal, and John G. Venditto, Assistant Superintendent of Schools for Personnel.

The plaintiff, Richard A. Belanger, was the unanimous choice of the Evaluating Committee. The Superintendent,

after reviewing the candidates with the Evaluating Committee, unanimously concurred in their judgment.

The next step in such a situation was to present the matter to the School Committee, which was done. The Warwick School Committee independently reviewed the case and selected the plaintiff, Belanger, for the vacancy. He was duly appointed by the School Committee, entered upon his duties and spent a year therein before he was disturbed in his tenure.

The defendant, Matteson, not satisfied with this result notified the defendant Union that he wanted to grieve the decision of the School Committee appointing Belanger as Department Head. The Union initiated Step 2 of the aforesaid agreement, and covered the various steps numbered by the Union as 2, 3 and 4 (Plaintiff's Exhibit 1A, Section on Grievance Procedure, Article III, Sec. 2, page 5).

In each of the steps the grievant was turned down. He thereupon called upon the Union to proceed to arbitration. The Union's executive board approved and procedures for arbitration were initiated.

The plaintiff, Mr. Belanger, and the defendant, Mr. Matteson, were fellow teachers in the Warwick School System and they were eligible to seek the promotion contemplated in the notice posted by the School Committee of an opening in the position of Business Department Head.

The agreement between the Warwick School Committee and the Union, with respect to promotional policy is contained in Article V and Section 4(b) thereof is as follows:

> "Candidates shall be recommended on the basis of qualifications for the position. Where qualifications are considered equal, seniority in the Warwick School System shall prevail." (Page 11 of the printed agreement.)

Certain steps are required by the agreement between the Warwick School Committee and the Warwick Teachers Union. Time limits are established for the regulation of actions. Mr. Belanger was not a party to the proceedings. When time limits were waived Mr. Belanger was not called upon to give his assent.

Mr. Belanger and Mr. Matteson were both members of the Teachers Union. The obligation of the Union was to treat its members fairly. *Vaca* v. *Sipes,* 386 U.S. at 171. It is quite apparent that, notwithstanding this obligation, the Union aligned itself totally on the side of Mr. Matteson, and sought Mr. Belanger's defeat. It gave its standing and its strength to the dismissal of Mr. Belanger and to the appointment of Mr. Matteson in his place and stead.

> "It is now well established that, as the exclusive bargaining representative of the employees in Owens' bargaining unit, the Union had a statutory duty fairly to represent all of these employees, . . ."

Vaca v. *Sipes, supra.*

The Wisconsin Supreme Court in *Clark* v. *Hein-Werner Corp.,* 8 Wisc. 2d 264, 99 N.W. 2d 132, 137 (1949) held that:

> ". . . where the interests of two groups of employees are diametrically opposed to each other and the union espouses the cause of one in the arbitration, it follows as a matter of law that there has been no fair representation of the other group. This is true even though, in choosing the cause of which group to espouse, the union acts completely objectively and with the best of motives. The old adage, that one cannot serve two masters, is particularly applicable in such a situation."

Professor Archibald Cox in an article in the *Harvard Law Review,* Volume 69, Number 4, page 632, made the following statement:

> ". . . In *Steele* v. *Louisville & N.R.R.* [323 U.S. 192 (1944)] Chief Justice Stone held that the statutory bargaining representative has the duty 'to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them.' . . . The principle seems equally applicable to grievances, as the Court of Appeals for the Fifth Circuit noted in the *Hughes Tool* case."

In *Vaca* v. *Sipes, supra,* at page 190, it is stated as follows:

> "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith . . . ."

In the instant case the conduct of the Union has been arbitrary in that it went about the business of acting on the grievance with sole regard for the rights and interests of Mr. Matteson, and affirmatively against the rights and interests of Mr. Belanger. Thus it discriminated against Mr. Belanger.

Mr. Matteson, under Step 3 of the agreement, met with the Superintendent of Schools and he was accompanied by Mr. William M. Tammelleo, Union President. At Step 4, a hearing before the School Committee, Mr. Edward J. McElroy, who is listed as Chief Negotiator, and Mr. Tammelleo appeared with Mr. Matteson. Mr. Belanger was not present. However, some two weeks before the time set for the hearing in arbitration, Mr. Belanger was notified he was to be a witness at the arbitration hearing. He met with Mr. Venditto to discuss his forthcoming testimony.

Mr. McElroy presented the Union's case at the arbitration hearing. He met with Mr. Matteson to go over his testimony on Mr. Matteson's behalf. He never contacted

Belanger prior to the arbitration to determine what his qualifications were for the position.

At the trial the plaintiff says the Union offered testimony in support of the contention that it was not representing Mr. Matteson but that it was providing a forum in which he could air his grievance.

To the contrary, Mr. Belanger contended (1) that the Union moved side-by-side with Matteson through every step of the grievance process; (2) that after Mr. Matteson was unsuccessful through Step 4 of the grievance procedure, the Union Executive Committee at Mr. Matteson's request met to decide whether to take the case to arbitration, that neither at the meeting nor at any other time did the members of the Union Executive Committee ever inquire as to the qualifications or rights of Mr. Belanger, and that nevertheless upon the recommendation of Mr. McElroy, the Executive Committee voted to take Mr. Matteson's case to arbitration.

On April 6, 1973, the arbitration hearing was held. It lasted from 10:00 a.m. to about 6:30 p.m. A number of witnesses were called by the Union and by the School Committee. Mr. Matteson was called by the Union and Mr. Belanger by the School Committee. Mr. Venditto had the opportunity to cross-examine the Union's witnesses; and Mr. McElroy had the opportunity to cross-examine the School Committee's witnesses, including Mr. Belanger. After the hearing, Mr. McElroy and Mr. Venditto filed briefs. There was no stenographic record of the meeting.

Mr. Belanger was removed from the job which he had held for about one year and Mr. Matteson was appointed in his place. Mr. Belanger then informed the Union that he felt he had a grievance. The Union replied that they would pursue any grievance he might have regarding the adequacy of his representation by the School Committee

but not any grievance which would attempt to get Mr. Belanger's job back.[1]

The case file indicates the School Committee was a party plaintiff in support of Mr. Belanger on a petition in this Court to vacate the award to Mr. Matteson, but the next day after the filing of the petition the School Committee withdrew as a party plaintiff and became a party defendant. The reason appears to be on page 9 of the Plaintiff's Memorandum of Facts and Law.

It would appear that the first question concerns the Court's power to vacate the award. The problem lies in the fact that there are general rules dealing with the arbitration of labor controversies (R.I.G.L., 28-9-1 et seq.) and there are specific rules dealing with arbitration of teacher disputes (R.I.G.L., 28-9.3-1 et seq.). The rules for dealing with labor controversies in general state that the Court must vacate the arbitration award if:

(a) The award was procured by fraud;
(b) The arbitrators exceeded their powers;
(c) There was no valid submission or contract. (R.I. G.L., 28-9-18)

The rule dealing specifically with school teachers (R.I. G.L., 28-9.3-12) is that arbitration decisions are binding on school teachers, their representatives, and the school committee on all matters not involving the expenditure of money. The decision is final and no appeal shall be therefrom except on the ground that the decision was procured by fraud or that it violates the law.

The court in *Clark* v. *Hein-Werner Corp., supra,* said in declining the case that it relied on the equity power

[1] A comparison of Mr. Belanger's and Mr. Matteson's qualifications (academic, et al.) may be found on page 8 of Plaintiff's Memorandum of Facts and Law. I do not know what portion or percentage of Mr. Belanger's qualifications are contained therein, or what portion or percentage of Mr. Matteson's qualifications are contained therein.

"to grant relief in situations which offended the court's sense of justice and fair play".

In the case of *Providence Teachers Union* v. *School Committee of the City of Providence,* 108 R.I. 444 (1971) it was held that Chapter 28-9 set up the legislative framework for the arbitration of labor controversies, and it was inferred that such general principles should be applied to specific statutes dealing with firemen, policemen and school teachers. The case went on to say that statutes which are not inconsistent with one another and

> ". . . which relate to the same subject-matter, are in *pari materia* and should be considered together so that they will harmonize with each other and be consistent with their general object and scope, even though they contain no reference to one another and were passed at different times."
>
> *Smith* v. *Higinbothom,* 187 Md. 115, 48 A.2d 754.

The issues, according to the plaintiff, are as follows:

1. Does the failure of the bargaining representative to fully, fairly and properly represent Mr. Belanger require the Court to vacate the arbitrators' award?
2. Did the arbitrators exceed their powers in reaching their decision so as to require the Court to vacate the arbitrator's award?

The issue, according to the defendant, is:

1. Did the action of the Warwick School Committee in failing to appoint Mr. Arthur Matteson to the position of Business Department Head at Warwick Veterans Memorial High School constitute a violation of the agreement?

The parties before me seemed to agree that the case which I have for decision was not one where the parties were free to present evidence as in *de novo* with respect to the qualifications of Mr. Belanger and Mr. Matteson.

In other words, the parties did not lock horns on the issue of qualifications in this Court as they apparently had pretty well exhausted this subject in prior proceedings and they felt this was not one of the issues in the case before me. However, such evidence as did find its way into the case on the subject of qualifications was considered by the Court if pertinent, solely on the issues of fair representation, of violation of law, and of exceeding their powers, but not on the issue whether Mr. Belanger or Mr. Matteson was superior in qualifications.

The statute, *General Laws of Rhode Island,* 1956, 28-9.3-12, entitled "Arbitration of School Teacher Disputes", provides in part as follows:

> ". . . The decision of the arbitrators shall be final and no appeal shall lie therefrom except on the ground that the decision was procured by fraud or that it violates the law, . . ."

The applicable portion of the above statute is whether the decision violates the law. It is clear we are not involved in any situation where the decision was procured by fraud.

This statute and the provisions of 28-9-18 provide that the Court must make an order vacating the award ". . . where the arbitrator or arbitrators exceeded their powers, . . ." and/or "where they violated the law."

These two statutes (28-9-18 and 28-9.3-12) were considered by our Supreme Court in connection with the *in pari materia* rule in *Providence Teachers Union* v. *School Committee of the City of Providence, supra.* I find that further it is provided in 28-9-1 as follows:

> "A provision in a written contract between an employer and an association of employees, a labor union, trade union or craft union, or between an association of employers and an association of employees, labor unions, trade unions or craft unions, to settle by arbitration any controversy shall be valid, irrevocable

and enforceable, *save upon such grounds as exist in law or in equity for the revocation of such contract* . . . ." (Emphasis by the Court)

The Court may construe that in a particular case an award made in excess of an arbitrator's authority may be deemed unlawful.

A comment may be made as to where the burden of proof in the trial before the Arbitration Board rested. Arbitrator MacLeod says (Plaintiff's Exhibit 1) that the burden of showing seniority and that he is qualified for the position rests with the Union. He says that once this is done, the burden shifts to the Committee to demonstrate the reasonableness of its judgment on relative qualifications.

To my mind the burden does not shift to the School Committee but remains with the Union. The latter is the party which seeks to overturn the appointment of Mr. Belanger. It is the body which says that the School Committee of the City of Warwick, and the Superintendent of Schools and the Assistant Superintendent of Personnel, and the Evaluating Committee were wrong in selecting Mr. Belanger. It seems to the Court that these facts placed the burden upon the Union to prove it.

Before it can be established that the Board acted beyond its authority, or in violation of law, there must be some determination as to what authority rests in the arbitration board.

There is no source that explicitly delineates the limits thereof but there are some guidelines which are helpful.

The School Committee is vested with the power and authority to select school teachers. It was the body that made the selection of the plaintiff to fill the vacancy. It was held in *Dawson* v. *Clark*, 93 R.I. 457, 176 A.2d 732 (1962) that the School Committee could not delegate the

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jurisdiction conferred upon it in the absence of legislative authority to do so.

The agreement provides (Article XVI) under the heading of "Management Rights", page 38, in part as follows:

> "It is understood and agreed by the parties that the School Committee possesses the sole right to operate the school system and that all management rights repose in it and the administration but that such rights must be exercised consistently with the other provisions of this agreement. These rights include but are not limited to the following:
>
> "(1) Hire, assign and transfer . . . teachers . . . ."

The arbitration board, in ousting the plaintiff from his position of Business Department Head and appointing and installing the defendant Mr. Matteson in said position was exercising the authority that had been vested exclusively in the School Committee. If the arbitration board does not have the authority to hire and assign teachers, then their award would be in excess of their powers and in violation of law.

It is provided in 16-2-18 of the *General Laws* that:

> "The selection of teachers and election of superintendent . . . , and the entire care, control, and management of all the public school interests of the several towns, shall be vested in the school committee of the several towns."

Cities are included in the word "towns".

Again in 16-2-11 of the *General Laws* under the heading "General Powers and Duties of Superintendent", it is provided that

> "The superintendent of schools employed in accordance with the provisions of this chapter, shall, under the direction of the school committee, have the care and supervision of the public schools and shall be the chief administrative agent of the school com-

> mittee . . . . He shall recommend teachers, including principals, supervisors, and assistants, to the school committee for appointment to service in public schools. . . ."

If the power of the Arbitration Board extends to the discharge of Mr. Belanger and the appointment of Mr. Matteson, it is exercising a power which is fundamental to the body charged with the operation of the school system, namely, the School Committee. Such a transfer of authority should be clearly shown.

It has been suggested that Mr. Belanger was represented at the arbitrators' hearing by the School Committee. Pertinent to this is the following quotation from *Clark* v. *Hein-Werner Corp., supra,* at 136 (Wisc.)

> "Employees not fairly represented by the Union should never be put in the position of having to solely depend upon the employer championing their rights under the collective bargaining contract."

The plaintiff's prayer that the award be vacated is hereby granted on the grounds that the arbitrators exceeded their powers and that the arbitrators acted in violation of law.

The first is demonstrated in the act of the arbitrators dismissing Mr. Belanger from the post of Business Department Head and the appointment of Mr. Matteson in his place and stead.

The ground that the arbitrators acted in violation of law is established by the denial of fair representation to Mr. Belanger.

Mr. Belanger shall be forthwith appointed to the post of Business Department Head at Veterans Memorial High School and shall be paid the increment from the date he was discharged by the arbitrators.

BLEED THROUGH

STATE OF RHODE ISLAND
SUPERIOR COURT

KENT, SC.

RICHARD A. BELANGER
v.
ARTHUR B. MATTESON, WARWICK TEACHERS UNION, LOCAL 915, AFT, AFL-CIO, WARWICK SCHOOL COMMITTEE, WILLIAM TAMMELLEO, WILLIAM J. TOOHEY and DANIEL G. MAC LEOD, in their capacities as Arbitrators in Case Number: 1139-0036-73

COMPLAINT

Plaintiff, Richard A. Belanger, respectfully represents as follows:

1. Plaintiff, Richard A. Belanger, is a Warwick resident and a teacher in the Warwick school system.

2. Defendant, Arthur B. Matteson, is a Warwick resident and a teacher in the Warwick school system.

3. Defendant, Warwick Teachers Union, Local 915, AFT, AFL-CIO, (hereinafter called the "Union") is an unincorporated association and labor organization which is the collective bargaining representative of certain teachers of the City of Warwick, Rhode Island, having its principal office in the City of Warwick, State of Rhode Island.

4. Defendant, Warwick School Committee (hereinafter called the "School Committee"), is the body having the direction and control of the public schools of the City of Warwick, Rhode Island.

5. Defendants, William Tammelleo, William J. Toohey and Daniel G. MacLeod, were the arbitrators in the matter of arbitration between the Warwick Teachers Union, Local 915, AFT, AFL-CIO and the Warwick School Committee, Case Number: 1139-0036-73.

6. On June 22, 1972, pursuant to Article V, Section 2(a) of the Agreement between the Warwick School Committee and the Warwick Teachers' Union, a notice of vacancy in a "promotional position" for Business Department Head was posted. The notice indicated the following qualifications for the position:

> "*General Statement of Responsibilities:*
>
> In addition to the *personal qualifications* determined by the administration to be necessary for appointment, candidates should have classroom experience leading to a thorough knowledge of the subject matter of the department. The *department head should have the ability to lead teachers* and students, resulting in a high degree of cooperative action and good morale. He should have an *exceptional ability to plan, develop and evaluate the curriculum of his particular discipline.*
>
> *Education:*
>
> Bachelor's and Master's degrees from an accredited college or university."

7. Four candidates applied for this vacancy including plaintiff, Richard A. Belanger, and defendant, Arthur B. Matteson. As is the practice for such promotional positions, the Superintendent appointed an evaluating committee to review the applications, interview the candidates and make recommendations to the Superintendent. Such a committee was here established being composed of Clyde Bennett, Assistant Superintendent for Secondary Education, Christopher K. Rallis, Veterans Memorial principal, and John G. Venditto, Assistant Superintendent for Personnel. Richard A. Belanger was the unanimous choice of the committee and the Superintendent, after reviewing the candidates with the evaluating committee, concurred in their judgment. The School Committee, after independently reviewing the applications, selected Mr. Belanger for the

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vacancy. Mr. Belanger served as Business Department Head at Warwick Veterans Memorial High School from August 1, 1972 to August 17, 1973.

8. Arthur B. Matteson, who is senior to Mr. Belanger in the Warwick School System, grieved the decision of the School Committee and the matter was submitted to arbitration on April 6, 1973.

9. Plaintiff was never given the required notice by the Union or the School Committee that Mr. Matteson had grieved the decision of the School Committee. Approximately a week before the arbitration hearing, plaintiff, in a telephone conversation with Mr. Venditto, the Assistant Superintendent for Personnel, was informed that he should attend the arbitration hearing because the School Committee wanted him to be a witness. Neither the Union nor the School Committee ever advised plaintiff that he should have counsel at the arbitration hearing. He was never told that he could have counsel at the arbitration hearing and he was never informed that he had a right to intervene as a party in the arbitration hearing.

10. The arbitrators found that the School Committee violated Article V, Section 4(b) of the Agreement between the Warwick School Committee and the Warwick Teachers Union which states: "Candidates shall be recommended on the basis of qualifications for the position. Where qualifications are considered equal, seniority in the Warwick School System shall prevail." The arbitrators found that the qualifications of Mr. Matteson and Mr. Belanger were "roughly equal" and therefore awarded the position to Mr. Matteson, who was senior.

11. Plaintiff alleges that Mr. Belanger's qualifications, both professional and personal, are unquestionably superior to those of Mr. Matteson. Mr. Belanger has completed two undergraduate degree programs and two graduate degree programs while Mr. Matteson has completed only

one undergraduate degree program and one graduate degree program. Mr. Belanger has a Masters in Business Administration, an in-subject graduate degree, which Mr. Matteson does not. Moreover, the School Committee was aware that the evaluating committee which consisted of two superintendents and a high school principal unanimously found that Mr. Belanger had superior personal qualifications as set out in the notice of vacancy which were superior to those of all the other applicants. Consequently, on the basis of these facts, the School Committee appointed Mr. Belanger to the vacancy.

12. Plaintiff alleges that arbitrators exceeded their powers and went outside the agreement between the Warwick School Committee and the Warwick Teachers Union. Rather than attempting to determine if there was evidence upon which the School Committee could base its decision that Mr. Belanger's qualifications were superior, the arbirators chose to shift the burden to the School Committee and require it to demonstrate that it did not act arbitrarily. The arbitrators required the School Committee to establish a degree of superiority which was "material" and "marked", yet they never defined what these terms meant. Consequently, a demonstration of whether the School Committee's conduct was reasonable was made subject to the arbitrators' determination of "the sufficiency of tangible evidence". Yet, in this instance, the arbitrators ignored the evidence presented by the School Committee and instead they substituted their judgment for that of the School Committee. Their action was in violation of the agreement between the School Committee and the Union and was contrary to the intent of the School Committee in submitting the matter to arbitration. The School Committee is vested with the responsibility and authority for the selection of teachers and for the entire care, control and management of all public school interests. Such re-

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sponsibility and authority is vested in the School Committee by General Laws, 1956 (1969 Reenactment) §16-2-18. The School Committee had neither the intention nor the legal authority to delegate its responsibilities to the arbitrators. The arbitrators in substituting their judgment for that of the School Committee usurped the School Committee's authority and responsibility for managing school affairs. In so doing, the arbitrators went outside the contract and exceeded their powers. If the arbitrators' decision is allowed to stand, then it will permit the substitution of an arbitrators' decision for the determination required to be made by the School Committee in promotional decisions. Since the arbitrator exceeded his authority, the court in the exercise of its equity powers or pursuant to General Laws, 1956 (1969 Reenactment) §28-9-18 and §28-9-21, must make an order vacating the arbitrator's award.

13. Plaintiff contends that the Union had a duty to represent his interests. In that the Union chose to take to arbitration a matter which if decided in the Union's favor would be adverse to plaintiff's interest, the Union did not and could not have fairly represented him. Consequently, it was the duty of the Union to inform plaintiff of its position, to inform him that he had a right to intervene in the arbitration matter and to inform him that he could and should have legal counsel representing him at the arbitration hearing. Because the Union failed to so notify plaintiff, it failed to meet its obligations to him and, consequently, plaintiff's rights were not protected at the arbitration hearing and he was not afforded an opportunity to protect his rights. In addition, the School Committee never instructed plaintiff how he should protect his rights. Plaintiff had significant interests in his position as Business Department Head at Warwick Veterans High School and he was not afforded due process of

law so as to be able to protect his interests. Therefore, equity and justice require that the arbitrator's award not be binding upon plaintiff.

WHEREFORE, the plaintiff prays that this Honorable Court do the following:

1. Temporarily and permanently enjoin the enforcement of the award of the arbitrator in Case Number: 1139-0036-73.

2. Vacate the award of the arbitrator in Case Number: 1139-0036-73.

3. Restore plaintiff to the position as Business Department Head at Warwick Veterans Memorial High School and award plaintiff back pay for that position from August 17, 1973.

4. Award plaintiff his costs and attorney's fees.

5. Grant such other relief as this Honorable Court may deem just and proper under the circumstances.

RICHARD A. BELANGER
By his Attorney,
(s) FRANK LICHT
FRANK LICHT
LETTS, QUINN & LICHT
830 Hospital Trust Building
Providence, Rhode Island 02903

Dated:

AFFIDAVIT

I, Richard A. Belanger, have read the above petition and upon oath depose and say that all of the allegations are factual and true to the best of my knowledge.

(s) RICHARD A. BELANGER
RICHARD A. BELANGER

Subscribed and sworn to before me at Providence, Rhode Island, this 15th day of October, 1973.

(s) ILLEGIBLE
Notary Public

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AMERICAN ARBITRATION ASSOCIATION

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration between
WARWICK TEACHERS UNION, LOCAL 915, AFT, AFL-CIO
and
WARWICK SCHOOL COMMITTEE
Case Number: 1139-0036-73

AWARD OF ARBITRATOR

THE UNDERSIGNED ARBITRATORS(s), having been designated in accordance with the arbitration agreement entered into by the above-named Parties, and dated February 1, 1972 and having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARDS as follows:

The Committee violated Article V Section 4(b) of the collective bargaining agreement by not appointing Mr. Arthur Matteson as Business Department Head at Veterans Memorial High School. Mr. Matteson shall be forthwith appointed to such post and shall be paid the increment for the same from September 1, 1972.

WILLIAM TAMMELLEO, *Union Member*

WILLIAM J. TOOHEY, *Committee Member*
(s) DANIEL G. MACLEOD
DANIEL G. MACLEOD, *Impartial Chairman*

Arbitrator's signature (dated)

August 17, 1973

STATE OF)
)ss.:
COUNTY OF)

On this day of , 19 , before me personally came and appeared
to me known and known to me to be the individual(s) described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

WARWICK TEACHERS UNION, LOCAL 915,
AFT, AFL-CIO
and
WARWICK SCHOOL COMMITTEE
AAA Case No. 1139-0036-73

OPINION OF ARBITRATOR

This case was heard on Friday, April 6, 1973, before a Board of Arbitration composed of William Tammelleo, Union Member, William J. Toohey, Committee Member, and Daniel G. MacLeod, Impartial Chairman selected through procedures of the American Arbitration Association. There were present at the hearing for the Union:

Edward McElroy, Exec. Sec'y
Arthur B. Matteson, Grievant
Walter L. Phillips, Teacher
Allen F. Swann, Pilgrim High Bus. Dep't Head

and for the Committee:

John G. Venditto, Ass't Sup't Personnel
Clyde Bennett, Ass't Sup't Secondary Ed.
Domenic R. DiLuglia, Sup't
Christopher K. Rallis, Principal, Veteran's High
Richard A. Belanger, Veterans' High Bus. Dep't Head
Edward G. Hunt, Ass't Sup't Curriculum

Post-hearing briefs were filed, and the Board met in

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executive session in Warwick on Wednesday, July 11. All members of the Board have executed the Award, indicating concurrence or dissent, but this Opinion has been prepared by the Chairman alone, and it reflects his views, which are not necessarily shared by the other Board members.

Background Statement

Under date of June 22, 1972, the following Notice of Vacancy was posted for Business Department Head at Warwick Veterans Memorial High School:

The following department head positions are open for application at the Warwick Veterans Memorial High School:

Business
Physical Education

General Statement of Responsibilities:

In addition to the *personal qualifications* determined by the administration to be necessary for appointment, candidates should have classroom experience leading to a thorough knowledge of the subject matter of the department. *The department head should have the ability to* LEAD TEACHERS and students, resulting in a high degree of cooperative action and good morale. He should have an *exceptional ability to plan, develop and evaluate the curriculum of his particular discipline.*

Education:

Bachelor's and Master's degrees from an accredited college or university.

Salary:

1.13, 1.16 or 1.19 times the basic teacher salary schedule maximum, depending on the number of teachers in the department, plus graduate degree increments.

Application:

Submit written application including experience, education, etc., to:

Mr. John G. Venditto, Assistant Superintendent of Personnel
Warwick School Department
34 Warwick Lake Avenue
Warwick, Rhode Island 02889
Applications to be submitted no later than July 10, 1972.

The Department Head position was a "promotional position" under Section 1(a) of Article V of the agreement, and this Notice of Vacancy was presumably prepared in response to the requirements of Section 2(a) of that same Article, viz.:

> The notice of vacancy shall categorically set forth all qualifications, requirements, duties, salary, and other pertinent information.

As is recognized by Section 3(a) of Article V, it is the responsibility of the School Committee to appoint persons to such a position, but the Committee acts on the basis of nomination by the Superintendent. The practice is for the Superintendent to appoint an evaluating committee to review applications, interview candidates and make recommendations to the Superintendent. Such a committee was here established, being composed of Clyde Bennett, Ass't Sup't for Secondary Education, Christopher K. Rallis, Veterans Memorial Principal, and John G. Venditto, Ass't Sup't for Personnel.

There were four applicants for the vacancy, among them Richard A. Belanger, a teacher in the Business Department at Veterans, and Arthur B. Matteson, a teacher in the Pilgrim High Business Department. The evaluating committee received data regarding all candidates and interviewed three of the four, including Belanger and Matteson. (One candidate, Walter Phillips, was in the hospital at the time and waived interview.) Belanger was the unanimous choice of the committee, and the Superintendent, after reviewing

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the candidates with the evaluating committee, concurred in their judgment. Matteson, who is senior to Belanger, grieved the decision, charging a violation of Article V, Section 4(b), which reads like this:

> Candidates shall be recommended on the basis of qualifications for the position. Where qualifications are considered equal, seniority in the Warwick School System shall prevail.

The case is submitted to the Board, with the issue formulated in these terms:

> Has the Committee violated Article V, Section 4(b) of the collective bargaining agreement by not appointing Mr. Arthur Matteson as Business Department Head at Veterans Memorial High School? If so, what shall the remedy be?

Positions of the Parties

The Union says that 4(b) and 2(a) of Article V must be read together, so that the "basic qualifications" to be assessed under 4(b) are the same "qualifications" required by 2(a) to be "categorically set forth" in the Notice of Vacancy. Belanger and Matteson, then, are to be measured against the specifications in the June 22 notice. If he is qualified in terms of those specifications, Matteson, being senior, is entitled to the job under 4(b) unless the Committee can demonstrate, by objective evidence, that Belanger is superior in terms of those same qualifications. This the Committee has failed to do, the Union says. The Committee's own justification for the decision shows that it turned on subjective assessment of factors nowhere specified in the notice. Measured against the proper yardstick, Matteson is not only Belanger's equal but his superior.

The Committee in its brief suggests that the burden is on the Union to show that Matteson's qualifications are at least equal to those of Belanger. This the Union failed

to do. On the contrary, the evidence shows that "Mr. Belanger's qualifications, both professional and personal, are far superior to those of Mr. Matteson." Moreover, when 4(b) refers to equal qualifications, it does not establish a standard of equality in fact but rather of equality in the judgment of the administration representatives. The evaluating committee, the Superintendent and ultimately the School Committee did not "consider" the qualifications of the two men to be equal. This judgment decision was arrived at through a fair procedure. As to those qualifications which are measurable by objective data, the evidence provides such data. As to those qualifications—the "personal qualifications"—which are not so measurable,

> . . . [W]e have to rely on responsible people in responsible positions to assess the qualities as they observe them and to make judgments accordingly. *There is no other way.*

The decision-making process involved such responsible people who exercised their judgment in a responsible manner. The matter must end there. So, the Committee argues.

DISCUSSION

The Contract Standards

It appears that this is the third case in arbitration involving claimed violations of Section 4(b) of Article V. I have been provided with copies of the Opinion and Award of Arbitrator Teele in the *DelGuidice case*, (No. 1130-0428-69) and of Arbitrator Santer in the *DelVecchio case* (No. 1139-0462-71). Both men, for each of whom I have profound respect, express views on the meaning and application of 4(b), sometimes in straightforward exposition, sometimes by implication. I think it fair to say that those views, to the casual eye, are not entirely consistent with one another.

Arbitrator Teele emphasizes the School Committee's burden to support its judgment of inequality by "sufficient

tangible evidence." Over and over again, he rejects the claim that an honest, subjective judgment is enough:

> ... When the action taken by the School Committee is submitted to a Board of Arbitration under the contract, as in this case, and a finding in support of the School Committee's action is requested of this Board —definite and tangible evidence is necessary to allow the Arbitration Board to act. Common sense indicates that the Arbitration Board could not accept a blind opinion that A was better than B, or similarly could not accept a formal statement that this was the case unless it had something to go on. Early cases in industrial arbitration, and current cases in the developing field of arbitration for public employees, both confirm that when management's judgment is challenged and when this judgment is to be supported or denied, the Arbitrator will have to be given factual or tangible evidence of the basis for this judgment.

Arbitrator Santer, however, emphasizes the importance and the contractual validity of non-objective judgments. He viewed as more important than measurable differences in educational background, a perceived difference in "leadership potential" developed through the interview process:

> ... A "trained" interviewing committee, working at a higher level of the intellectual process, can make reasoned judgments without so-called objective standards, because no such standards exist.

And again:

> It is true that the method employed is non-objective. It cannot be otherwise ...

Closer analysis of the two opinions leads to far more consistency, if not total reconciliation. It will be observed that Arbitrator Teele did not wholly reject all subjective assessment. What concerned him was the absence of any significant tangible evidence in support of the Committee's

judgment. Arbitrator Santer had before him some objective basis for drawing lines between the two candidates, in the form of materially different educational backgrounds. Beyond this, the "subjective assessment" of leadership potential was supported by specific evidence as to how the two men performed in the interview process—one expressing himself ably on team teaching and suggesting how this might be developed in the Department with him at the head, the other supplying only vague generalities in response to questions about the role of a Department Head. There was more there than a gestalt reaction to an individual.

It bears noting that Arbitrator Santer seems to place upon the Union the burden of showing that the aggrieved person is at least equal to the junior man selected. There is some language in Arbitrator Teele's opinion which would lead to the same conclusion, but such statements are undercut by others which focus on the School Committee's failure "to show that their contrary judgment was supported by sufficient tangible evidence."

I think it would be well for me to state as clearly as I can what I perceive to be the contract standards in cases of this character. In doing so, I shall attempt to stay within those guidelines which I find to be clearly agreed upon by the two previous arbitrators.

First of all, I agree with the Union that 4(b) and 2(a) are to be read together, that the "basic qualifications" by which candidates are to be judged under 4(b) are those same qualifications which 2(a) says must be presented in the notice of vacancy. Not only is this suggested by identity of language in the same contractual setting, but such a reading is reinforced by the purpose of the posting. In order to make the system work fairly, the applying teacher must be made aware of the standards by which he is to be judged. Only if this is done, can the applicant present information pertinent to the decision-making process.

Beyond this, it is implicit that the process will be a fair and evenhanded one, susceptible of meaningful review in arbitration. It follows that all applicants must be judged on the basis of common, mutually understood criteria. A hidden or after-the-fact standard is wholly unreliable as a guide for testing the administrative judgment. And the posting (which, I observe, under 4(f) will include full job descriptions) is the contract vehicle for communicating the standard.

It does not follow from what I have said that the general reference to "personal qualifications determined by the administration to be necessary for appointment" is insufficient as a statement of standard. This reference obviously encompasses those personal qualifications which are reasonably related to the position. So understood, the "personal qualifications" criterion is not open-ended.

Having identified the "qualifications", we must now inquire into the impact of seniority. "Where qualifications are considered equal," 4(b) says, "seniority in the Warwick School System shall prevail." "Considered equal" by whom?

It seems rather clear to me that 4(b) commits the issue of relative qualifications to be reasonable judgment of the administration. The word, "considered," read in context, surely supports this view. Article V is set up in a neatly structured order, describing in sequence just what happens in the job-filling process. Notice is to be posted, people will apply, recommendations will be made, post-recommendation explanation will be given, unsatisfied teachers may grieve. The sentence concerning relative qualifications is placed at the point of recommendation. It is the recommending authority, then, whose "consideration" as to "equality" is called for.

Most importantly, to read the language in this natural way leads to a sensible result. It would seem wise that

there should be room for judgment in filling positions of the character described in 1(a). One can understand, then, the unwillingness of the Committee to agree that an ad hoc arbitrator should exercise his own indepedent judgment about relative qualifications, given the very limited exposure he has to the situation.

Deference to the administration's judgment as to relative qualifications has got to be squared with the requirement of meaningful review. The parties clearly contemplated such review, not only by describing grievances in broad terms in Article III but also by specifically providing in 4(e) for grievances to be filed by dissatisfied applicants.

That such review goes beyond inspection of procedure is indicated by the need for substantive protection of the teacher's interest and by the fact that 4(e) ties the grievance to an unwillingness to accept the "reasons" offered by the administration for its decision. The reasons themselves, not just the procedures are subject to challenge. So I read the second sentence of 4(b) as importing a condition of reasonableness. The judgment about relative qualifications must be a reasonable judgment.

Where does the burden of proof lie on the matter? I believe that the Union has the burden of showing seniority in the grievant (ordinarily a simple task) and of showing that the grievant is qualified for the position. Development of such proof is within the Union's power. The qualifications are known, and the grievant presumably has at hand the information necessary to demonstrate his basic qualifications. Once this is done, the burden shifts to the Committee to demonstrate the reasonableness of its judgment on relative qualifications. After all, it is the administration which has made the decision. It knows the factors which moved it to reach the conclusion about the junior man's superiority. It must bring them forth.

And here we reach a crucial point. To discharge its

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burden, the Committee must do more than establish administration opinion—even unanimous opinion—as to superiority. In Arbitrator Teele's phrase, there must be shown "sufficient tangible evidence"—evidence that an arbitrator may evaluate. Purely subjective reaction, however honest, that a man is "better" or "a more effective leader" is not enough. The reviewing tribunal cannot evaluate a hunch. It can evaluate reasons grounded in fact. Such reasons and such facts must be shown.

Assuming the Committee comes forward with such evidence tending to establish the reasonableness of it judgment, that evidence must then be weighed along with evidence if any cutting the other way. The reasonableness of the judgment is to be tested in the light of the whole record, not just those factors which tend to support it.

Finally, the degree of superiority which the evidence establishes as the reasonable perception of the administration must be more than minimal. It must be material. It is impossible to quantify this standard, but it is no less real for that. It flows from the undoubted fact that precise equality as between two people, in terms of job qualification, almost never exists. Rough equality—just about the same—little to choose between the two—this is what the contract must mean when it talks of equality.

There is risk in attempting to capture all that I have said—at perhaps undue length—about the contract standards. Understanding that risk, and suggesting to the parties that this summation be read in the light of what has gone before, I would describe my general view in this way. Once the Union has shown that the grievant is senior and meets the basic job qualifications as communicated in the notice of vacancy, the Committee must demonstrate, by sufficient tangible evidence, that its perception of materially superior qualifications of the successful applicant was reasonable in light of the whole body of evidence bearing on qualifications.

Application of the Standards

The standards stated, it remains to apply them to this case. There is no doubt that Matteson is senior, and the evidence shows that he meets the basic qualifications for the position. Indeed, I do not perceive that either of these matters is challenged.

The administration view—the unanimous view of evaluating committee and superintendent, concurred in by the School Committee's appointment—was that Belanger was superior to Matteson and markedly so. What supports the reasonableness of that judgment?

The case ultimately comes down to three points on which the administration principally relied: (1) Mr. Belanger's dynamism or aggressive qualities; (2) Mr. Belanger's practical business experience; (3) Mr. Belanger's M.B.A. degree and the course of study that led to it. Other differences noted in the background of the two men are of small or little consequence. I confess that I do not understand the bearing of foreign travel upon this position. And that twenty-four years ago, when his interests lay in another direction, Mr. Belanger took a liberal arts degree, is certainly something that should not weigh heavily in the evaluating scale.

I take it everyone must be aware of how treacherous is the ground on which one stands when he justifies a decision on a perceived personality characteristic like "forcefulness" or "aggressiveness." One man's favorable "aggressive" is another man's pejorative "abrasive." Any good thesaurus will provide the proper adjective. I do not of course deny that such characteristics exist and that we often take them into account in assessing people for particular functions. I should have thought, however, that when one is dealing not with two unknown quantities but with two men who have both served for many years as teachers in a single system, one would have been con-

strained to ask: How have these men put to use the personal qualities I perceive in them? Has A's aggressive nature been translated into a force for constructive change or has it been a stumbling block to working with others? Has B's moderate manner caused him to retreat into himself or has it been used to secure the cooperation of others in some collaborative venture?

These are not idle or abstract questions. I realize how limited the scope of my exposure to this situation is. I say quite frankly, however, that the picture that comes across to me from the evidence is on the one hand, Matteson, a man undeniably moderate in appearance and demeanor, who has worked hard in cooperation with others in the development of important curriculum changes, who has in the recent past himself established major innovations in curriculum subsequently adopted by others, who has been selected by his colleagues to the Curriculum Council, who has been elected by that Council as its Secretary—and on the other hand, Belanger, a man who is forceful in appearance and demeanor, who seems to have operated routinely on his own, participating little if at all in similar activities. Which man is the potential leader for important change? Does the record count for naught? Does one really wish to rely—is it reasonable to rely—not upon what has been done but upon a general trait which may contribute to or derogate from leadership, depending upon how it is used?

I take it that the claim of Belanger's practical business background is based not upon the variety of jobs he held before he became a teacher but rather upon the electronic equipment sale and service venture that he has operated for many years. I do not intend to downgrade that experience when I note that it appears to be a one-man operation. Was any attention paid to Matteson's practical experience? For 17 years, he served as Business Manager of Yawgoog Scout Reservation, operating a budget of $150,000 to

$175,000 per year, handling purchasing, overseeing trading posts, working with a staff of 150 people, 50 of whom he hired and supervised?

Belanger's M.B.A. degree and the course of study leading to it is not matched by Matteson. It would seem to be related to the qualifications for the position, even though its focus is not in education but in managerial techniques. Presumably such background could provide material for curriculum development, even though Mr. Belanger's answer to a question along these lines was less than a happy one, explicable perhaps in terms of the strain any witness feels in the unfamiliar surroundings of a hearing.

I am acutely aware of the limited review which I exercise. Nonetheless, I am not persuaded, based on the whole body of the evidence, that the judgment of the administration as to Belanger's marked superiority was reasonable. It seems rather clear to me that the Committee failed to give any weight to Matteson's solid record of actual achievement bearing most directly on important job qualifications. In the area of curriculum change—which Committee members stated to be at the forefront of their concern—Belanger's "potential", grounded in the MBA work, perhaps, and his business experience cannot reasonably be compared with Matteson's performance. The difference here is marked, all right, but in the opposite direction. Overall, the Committee elected to infer "potential for leadership" from perceived general personality characteristics, again ignoring what the two men, with their concededly different approaches, have in fact done—or not done—in terms of working with others in the very kind of joint activity a Department Head should be stimulating and implementing. In my view, when one looks, as one must, at the whole body of evidence, the judgment most favorable to Belanger that the record would reasonably justify is that he and Matteson are roughly equal in terms of job qualifications. It follows that Matteson, being senior, was entitled to the position.

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The Remedy

The standard remedy seems appropriate. That is, Matteson is entitled to the appointment forthwith, and to the increment for the Department Head's position from September 1, 1972.

(s) DANIEL G. MACLEOD
DANIEL G. MACLEOD, Arbitrator

August 16, 1973
Boston, Mass.

STATE OF RHODE ISLAND
SUPERIOR COURT

KENT, SC.

RICHARD A. BELANGER
v.
ARTHUR B. MATTESON, WARWICK TEACHERS UNION, LOCAL 915, AFT, AFL-CIO, WARWICK SCHOOL COMMITTEE, WILLIAM TAMMELLEO, WILLIAM J. TOOHEY and DANIEL G. MAC LEOD, in their capacities as Arbitrators in Case Number: 1139-0036-73
M.P. No. 73-29

ORDER

This action came on for entry of a decree pursuant to a remand by the Supreme Court in its decision rendered on October 29, 1975 wherein the defendants' appeal was sustained, the judgment appealed fro- vacated and this case remanded to this Court.

A petition for reargument having been filed thereafter and denied and pursuant to said decision,

It is therefore, Ordered and Adjudged,

1. The judgment rendered by this Court in this matter on March 20, 1974 is hereby vacated.

2. That the Arbitrator's Award rendered on August 16, 1973 in Case Number: 1139-0036-73 is reinstated.

3. That Appellant Arthur B. Matteson be immediately reinstated to the position of Business Department Head at Warwick Veterans Memorial High School and that he receive all remuneration due him for said position since June 15, 1974, the date on which he last held the position of Business Department Head at Warwick Veterans Memorial High School.

4. That Appellant Arthur B. Matteson receive what-

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ever other relief may be due him pursuant to said Arbitrator's Award.

ORDERED:

(s) THOMAS W. MOOTY
Clerk of the Superior Court

ENTER:

(s) MULLEN, J.
Justice of the Superior Court

Date: December 3, 1975